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SOME HISTORICAL PRINCIPLES OF THE CONSTITUTION

BY

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CONTENTS

PREFACE

It is impossible for me to make exhaustive acknowledgments of my debts to previous authors, for I suppose that there is scarcely a sentence in this book which was not suggested by something I had read in print. Where I am conscious of direct indebtedness, I have indicated the creditors in footnotes. The largeness of my debt to the late Professor Dicey will be especially apparent.

I am most of all grateful to Mr. D. A. Winstanley, fellow and lecturer of Trinity College, Cambridge, and Mr. A. D. McNair, fellow and lecturer of Gonville and Caius College, Cambridge, who had the great kindness to read the book in manuscript, and saved me from many errors and omissions.

K.W.M P,
Corpus Christi College,
Cambridge

April 3rd, 1925

HISTORICAL PRINCIPLES

CHAPTER I

CONSTITUTION AND SOVEREIGNTY

FOR reasons of space, even if there were no others, this book will make no attempt to provide a history of the constitution, nor even a detailed analysis of the way in which it works nowadays. Any attempt, indeed, to explain the contemporary workings of government is always doomed to partial failure, for the interpreters can never be the same as the actors, many things cannot be known by any but the actors, and the actors themselves must see much falsely, because their conceptions are frequently antiquated, even when their behaviour is most opportunist. Indeed, the constitution as it is explained is usually the constitution as it was a generation earlier. Nevertheless, there may be some elements of the British constitution, some ideas and rules of government, which are comparatively permanent and an understanding of which is especially important now. Such elements are the sovereignty of Parliament,

the responsibility of Ministers, the rule of law; the pages that follow will show how deeply they are rooted in our constitutional past, and how essential they are to the constitution under which we live.

The *New English Dictionary* gives seven meanings, with some minor variants, of the word 'constitution.' The first is 'the action of constituting, making, establishing, etc.'; the second and third—'the action of decreeing or ordaining' and 'a decree, ordinance, law, regulation'—may be dismissed as obsolete; the fourth is the most general meaning of all: 'The way in which anything is constituted or made up; the arrangement or combination of its parts or elements, as determining its nature and character; make; frame; composition.' The fifth and sixth may be considered as special applications of the fourth: 'physical nature or character of the body in regard to healthiness, strength, vitality, etc.' and 'the mode in which a state is constituted or organised; especially as to the location of the sovereign power, as a *monarchical, oligarchical* or *democratic constitution.*' From this last meaning the seventh naturally arises: 'The system or body of fundamental

principles according to which a nation, State or body politic is constituted or governed.'

'Constitution' and its derivatives are words which constantly recur in discussions about government and politics, in senses often imperfectly thought out by speakers, and almost always vaguely and variously understood by audiences. The dictionary definitions may help to make clear what are the word's legitimate uses and natural connotations in the political vocabulary. The constitution of a country may mean the composition of its society, especially the political elements of it, and their arrangement; or, most commonly, the allotment of legal and effective powers, and especially the legal, or at least the effectively recognised, attribution of supreme power; sometimes the principles characterising the government of a State; to put it as generally as possible, the rules (of whatever sort) which settle how a country is governed.

For the existence of a constitution in the full sense, not only rules are necessary, but a set of rules. This involves a theory, an idea, of what government should be, and how it should be directed, an idea not merely held but embodied. Men played

at football long before there was a Football Association or a Rugby Union, but we can hardly say that they played football, that the game of football was constituted, until there was an agreement as to what should be its essence and object, and a code of rules to secure adherence to them. Similarly, it may be held by varying schools that though there is an *institutional* history of England there is no *constitutional* history before the sixteenth century or the seventeenth ; until it was not merely seen in theory, but established in the relation between political institutions that ' civil societies, so pleasing to Almighty God, cannot subsist without government, nor government without a sovereign power. . . . This sovereignty is a power over the people, above which there is none upon earth, whose acts cannot be rescinded by any other. . . .'

Of all rules, except moral rules, constitutional rules are the most important ; it is the more desirable that they should be known. The English assume habitually, and not altogether without justification, that they are especially well acquainted with the rules of morality ; they are apt also to assume that there is cause for pride in their ignorance of their constitution, and even that the British

constitution is in some sort unknowable, and all the better for it—as the English Church is the least definable of any and English poetry the least analysable. There are several common methods of accounting for this unknowable quality, and of suggesting that it is inherent and irremovable. It is said that our constitution is unwritten, and that therefore it cannot be learned by the simple process of reading an authorised text—as the American constitution can, for instance—that it is an arrangement of conventions and not a code of laws, and therefore in its essence impatient of definition; that it has not been made, but has grown, and therefore does not stand still, even less can be dissected, for the convenience of the student; that it is not rigid but flexible, and therefore cannot be surveyed once for all.

It is clear that these assertions are to some extent, but not altogether, different ways of saying the same thing. They are all well fathered and well patronised, and the youngest of them approaches the respectability of antiquity. They all contain truth, and truth well worth expression. Yet it may be that the truth which they contain has been so well and so often expressed that it has become

part of the common stock, and that the repetition of it tends now rather to the perpetuation of error.

It is quite true that our constitution is not written as the American constitution is, and yet our constitution is written. Theirs is written in one document, which it is impossible not to recognise, and in which there is nothing else—ours in thousands of documents, which can hardly be catalogued, and in almost every one of which there are many other things ; it may be argued that all of theirs is written, and not quite all of ours, but this is not so certain as is often supposed. No code of rules for the management of a society can be so clear and so complete as to make for ever unnecessary all interpretation and adaptation. The importance of written words is their realisation by acts, and in this connection practice and precedent soon rival the intentions of the writers. Suppose every living soul in the United States died to-night, to be miraculously replaced to-morrow by a new race, perfectly acquainted with the English tongue and extremely intelligent, but with no records to consult except the text of the constitution, and suppose they endeavoured to set going again American

government as it was working this morning, how much success would they be likely to attain? Or suppose the same thing happened in Great Britain, with the difference that here the new race had at their disposal every possible written source, would they be likely to do any worse? It does not seem certain that the Americans would win even if they had also the enactments of Congress and the other legislatures and the decisions of the Supreme Court, and, indeed, not quite certain that the opening to them of all records would give them a runaway victory.

Of all comments on the British constitution the one most frequently made, and usually made with an air of explaining everything, is that it was not made, but grew. It is true that our constitution was not made at one time and to one design, as the French constitution was, or the Belgian; but it was made, or rather it has been made and is being made, and it is the result of growth only in the metaphorical sense that its development has been slow and gradual. And then it would be ridiculous to suppose, for instance, that the men of 1875 were at liberty to arrange French government as they pleased, without reference to previous history.

The metaphor of growth has had its usefulness, but it has been employed excessively, and often misleadingly, for it has often been accompanied by the assumption that constitutional development has resembled growth in every essential particular, and especially in producing a necessary result. It is marvellous, as has been remarked,[1] that when you bury an acorn it explodes into an oak; but at least you know that it will not explode into an orchid or an elm. Now this is a characteristic of growth, and it is not (except perhaps to the mind of Omniscience) a characteristic of constitutional development. Nobody could, or can, know that the Teutonic community which Tacitus described, planted in England, must explode into parliamentary democracy, and the proof is that no one can know what it will explode into next. Moreover, each stage of constitutional development has been the

[1] By Mr. G. K. Chesterton, I think, to illustrate the credibility of the Resurrection The idea is not new; cf Herrick, in his *Noble Numbers* (Oxford edition, 1921, p 378).

> 'For each one Body, that i' th' earth is sowne,
> There's an uprising but of one for one
> But for each Graine, that in the ground is thrown,
> Threescore or fourscore spring up thence for one;
> So that the wonder is not half so great
> Of ours, as is the rising of the wheat.'

Cf. also 1 Corinthians xv. 37.

result of deliberate volition, to an extent which the extremest theorists of conscious evolution could not claim for the processes of natural growth; each step in constitutional development has been the result of what men thought and wanted, even when the effects of that step and the direction of the next were as different as possible from those men's intentions. The metaphors of *evolution* and *growth* are particularly dangerous, because in practice, whether necessarily or not, they tend towards fatalism, and that is sad, or even towards a fatalism in which the fatalist himself settles what the end is to be, and that is silly. Along with these expressions there are commonly found adjectives like *inevitable*, and the people who have this complacency for the mere event often achieve their cheerfulness by assuming that there has been an intention throughout the process, and that the intention is what they would wish it to be; in other words, that, as Providence has moved mysteriously to evolve out of the primeval slime political thinkers, so the genius of the constitution has proceeded at a varying pace, but without much deviation, from the barbarism of Hengist and Horsa, through the feudal darkness of William the Conqueror and Edward I, and the crass stupidity

of James II and George III, to our present enlightenment, and that it will go on irresistibly to perfect parliamentary democracy, or to establish the dictatorship of the proletariat, or to submit all human life to the direction of an enlightened bureaucracy, or whatever else.

This belief in history as a tendency, especially when combined with the delusion that its destination is known, is a serious bar to the understanding of a constitution in which much depends upon practice. It is fair to assert that such and such is the constitutional course because it is indicated by sure precedents. It is reasonable to claim that it ought to be made the constitutional course because it is the most desirable. It is the worst kind of dishonesty to contend that it must be the course authorised by custom because it is the course recommended by convenience—the worst kind, because it is generally unconscious, and often undetected.

Another substitute for explaining the British constitution has been to label it *flexible*. This use of the word was the invention of the late Lord Bryce, who thought that the most essential classification of modern constitutions was that of *flexible*

and *rigid*. His usage of these words he indicated in the following sentences: 'In a State possessing a constitution of the former—the older—type, all laws (excluding, of course, by-laws, municipal regulations and so forth) are of the same rank and exert the same force. There is, moreover, only one legislative authority competent to pass laws for all cases and for all purposes But in a State whose constitution belongs to the latter—the newer—type, there are two kinds of laws, one kind higher than the other, and more universally potent; and there are likewise two legislative authorities, one superior, and one capable of legislating only so far as the superior authority has given it the right and function to do so.'[1]

This is a very real and a very important distinction, and the names given to the two classes are sufficiently apt to be useful; but it is error (and error that is not uncommon, though it was not Lord Bryce's) to forget that they are only names, and not definite names to fix the whole truth, but metaphorical names to suggest part of it. One error especially which occurs in this way is the assumption that

[1] Bryce, *Studies in History and Jurisprudence*, vol. i, pp. 151 and 154.

the British constitution is more liable to change than any other; this is not altogether false, but the opposite would be just as true. If the French constitution, or the Swiss, is changed, it is changed unmistakably, and, if not permanently, at least for a considerable and definable period. If ours is changed it may stay changed or it may not. When the later Tudors or the earlier Hanoverians neglected attendance in Parliament or at the Cabinet, that was a constitutional change of great importance, but who could tell whether it was to be permanent or no? In the recent war the whole working of the Cabinet, the regulating mechanism of our Government, was altered; some of the alterations stand, but, in general, the earlier practice has returned.

There is another word of Lord Bryce's that may throw light here. He remarks[1] that 'constitutions of the older type may be called flexible, because they have elasticity.' Now the truth is that flexibility and elasticity are not identical nor even inseparable. The most exact, and therefore, the most useful, sense of *elastic* is 'tending strongly to return to the shape from which it has been bent.' Steel is

[1] Bryce, *Studies in History and Jurisprudence*, vol 1, pp. 151 and 154.

a highly elastic material. Francis Place[1] contemptuously called the British constitution 'that nose of wax which everyone twists to his purpose,' and it has something of the nature of wax, so much so that Lord Bryce (imitating Tocqueville) denied that there was a British constitution, and, though he may be thought to have been wrong, none but a very bold man would undertake to prove him wrong by showing where it is.

Steel is extremely unlike wax, nor are its shape and position mysterious; yet the constitution has something of the quality of steel. Think, for instance, of the survival of the Crown and the Church through the seventeenth century, of the persistence of committee government in the eighteenth and nineteenth centuries and of its recent recovery after the disturbance of war, of the immemorial tradition that public liberty is the sum of private rights.

Another element, or at least another way of

[1] Graham Wallas, *Life of Francis Place*, p. 289. Perhaps he had seen a pamphlet printed in 1670, *The People's Ancient and Just Liberties Asserted in the Tryal of William Penn, and William Mead*, where Penn is reported as saying, "If *Not Guilty* be not a Verdict, then you make of the Jury and *Magna Carta* but a meer *Nose of Wax*." The occasion is important as the leading case for the rule that juries are not to be punished for their verdicts.

regarding the same element, in the permanence, the fidelity to type, of the British constitution may be discerned by a comparison with the development of English law, especially the common law. 'Whenever a court or this House (of Lords), acting judicially, declares the law, it is presumed to lay down what the law is and was, although it may have been misunderstood in former days.'[1] In constitutional matters, which are at least as much as any other matters of practice and precedent, this presumption is very strong. The old notion was that law had an existence independent of human volition, that men and their courts could not make it, but only declare what it was. Law was what was right, according to the commandments of God and the light of reason, not what was ordered by the State, because as yet there was no State in the sense of a society with one unified government representing and directing all human activities. It was no more possible for courts or parliaments to abolish freeholds, for instance, than it is now for the British Association to repeal the law of gravity. Moreover, it was orthodox legal doctrine (expounded

[1] Quoted from a judgment by Lord Davey, in W. M. Geldart, *Elements of English Law*, 17, which cf. *passim*.

by Coke, for instance, and other chief justices) that the courts might void any law, statute or other, if it were against common right and reason; this doctrine survived to the eighteenth century, in which period, if it was obsolescent in England, it had plenty of vitality in America, and strongly affected the colonial controversy and the constitutional rebuilding there.

As the notion grew that law could be made and unmade, it was precisely in connection with constitutional rules that its application was slowest. The long survival of the older conception, and it is still not absolutely dead, is one chief reason why our constitution, if it has had as many variations as most, has yet more consistently than any preserved an essential identity.

Along with the dwindling of the old notion went the development of the theory, the orthodox theory of modern constitutional law, of the paramount validity of statute, the omnicompetence of Parliament; and indeed the two, dwindling and development, are but different aspects of the same process. This parliamentary omnicompetence is the essence of the modern constitution, and a few lines may usefully be devoted to its genesis, for what

it is cannot be understood without some knowledge of how it came to be.

When modern England began, Parliament was already unshakably established as the King's highest court, and what Parliament declared to be law was law without appeal.[1] But there were qualifications, of which the most material was that for some relations, not only between the King's subjects and aliens, but also between subject and subject, the appropriate law was not the King's law but the Church's. The altering of this was the great work of the sixteenth century. Henry VIII made the English Crown, and Elizabeth kept it, over all causes and all persons supreme. At the same time as foreign jurisdictions were thus abolished, or rather annexed to the Crown, the national sovereignty, which was thus making itself complete and exclusive, found the necessity for metaphysical sanction; the doctrine of the divine right of kings was forged as a weapon against the sacred arrogance of popes, and the Stuarts came to reign over a realm in which it was not merely the King's prescriptive right, but his consecrated duty, to govern all men in all their relations with each other and with foreigners.

[1] But cf. the top of p. 15.

For this purpose his highest court and most powerful engine was his Parliament. Like all instruments, it was not merely a potentiality, but a restriction, and, like most living instruments, it came to want first partnership and then mastery. The Tudors had shown that the King of England, using the two Houses, could do what he pleased. What would happen when the two Houses would not be used, when they had wills of their own, which they would not surrender?

It is not suggested that Tudor Parliaments were without will, but their will was not unmanageable, and they were ready enough to admit that policy and government were the King's business. Even James I's Parliaments agreed with the monarch in the doctrine of the divine right of kings, and they might have agreed longer if he had not been so insistent in expounding it. But when they began to say to themselves that they really could not be expected to stomach such decisions as James (and then Charles) made about taxation, and parliamentary privilege, and the Church, and foreign policy, and finally that it was not safe to leave the King the practical power of realising his decisions, and that therefore the militia must be

taken out of his hands, when these things happened, then the divine right of kings as a tenable theory of the English constitution was challenged, and when King Charles I was beheaded it was doomed. The reaction of the bulk of the nation against Puritans and doctrinaires allowed the cleverness of Charles II to disguise the disappearance of the old exclusive sovereignty of the Crown, but the attempt of his brother to flout the will of the people enabled the politicians, Tories and Whigs co-operating, to establish the rival doctrine, that the King could take no great decisions without Parliament, by whose confidence his authority was certified, and that, on the other hand, there was nothing that could possibly concern English government which could not be finally decided by the King in Parliament. By a series of historical accidents the King, in Parliament, was for a time the prisoner of the Whig chiefs; but the essence of the 1689 revolution was to settle the sovereignty on Parliament, with a very strong probability that inside Parliament the House of Commons would be increasingly the predominant partner; so that, although it was still possible for a King to get his own way, or for a clique of peers to govern, it was

only by securing a majority in the lower House that it could be done, and so that, though it could still be argued in this case or that, that statute was irrelevant or ineffective, yet it could not be successfully argued except in arms, as the Americans argued. This supremacy and omnicompetence of Parliament—Kings, Lords, and Commons, with the Commons, in the last resort, able to master the other two—is the cardinal feature of the English constitution in the eighteenth and nineteenth centuries.

It began as an anti-papal doctrine, and as such is fully and officially expounded in the Act forbidding papal dispensations, 1534[1]; 'It stands therefore with natural equity and good reason, that in all and every such laws human-made within this realm, or induced into this realm by the said sufferance, consents, and custom, your Royal Majesty, and your lords spiritual and temporal, and Commons, representing the whole state of your realm, in your most High Court of Parliament, have full power and authority, not only to dispense, but also to authorise some elect person or persons

[1] 25 Henry VIII, chap. 21 quoted in Gee and Hardy, *Documents Illustrative of the History of the English Church*, p. 209.

to dispense with those, and all other human laws of this your realm . . . and also the said laws, and every one of them, to abrogate, annul, amplify or diminish. . . .'

This is the assertion of legislative sovereignty to the exclusion of every external competitor (for the limitation to 'laws human' has been of almost no practical importance in later English development, except in the sense, common to all governments, that the sovereign power has been limited by the scruples of its own conscience). At first the King had no doubt that the sovereignty was his, though Parliament might be the appropriate place for its full exercise. In little more than a century the sovereignty was seized by Parliament, as when it claimed for its Acts 'the stamp of Royal Authority, although His Majesty, seduced by evil Council, do in his own Person oppose or interrupt the same, for the King's Supreme and Royal pleasure is exercised and declared in this High Court of Law and Council after a more eminent and obligatory manner, than it can be by any personal Act or Resolution of his own.'[1]

[1] Parliament's Declaration of May 27, 1642. quoted by C. H. McIlwain, *High Court of Parliament*, p. 389, from Rushworth, *Collections*, vol. iv, p. 551.

This is the doctrine that was enforced by the beheading of King Charles I, and, if the Restoration cloaked it, Charles II knew that the cloak might be torn off at any moment, unless King and Parliament managed to work together. The whole controversy about the exclusion of his brother, as it was conducted by both sides, illustrated the supremacy of Parliament. The behaviour of that brother, when, in spite of the controversy, he came to the Throne, caused the doctrine to be affirmed once more as strikingly as it had been by the execution of his father. It is not true that there were never more any doubts about it, but it was never again effectually resisted, except by the armed rebellion of the Americans.[1]

[1] Cf McIlwain, *The American Revolution*, *passim*.

CHAPTER II

SOVEREIGNTY, PARLIAMENT, AND TOLERATION

THE 'Glorious Revolution' obtained that title from grateful Whigs as a reward for having prepared a half-century of Whig dominance. This is a partial and dubious glory, a claim both higher and truer is that 1689 definitely gave the English people a constitution in the full sense, and gave that constitution a character which it was to retain for at least two centuries. There was now beyond doubt a definitely constituted Government, which, within English territory, could do anything physically possible and which it was capable of wishing to do, and this Government's supreme organ, the Parliament, was competent to make any and every use and interpretation of the Government's powers, and to declare or to rearrange the functions of all institutions and the relations between them.

The significance of this supremacy of Parliament may be better understood after some further explanation of the change which it involved, and

some illustration of the way in which it has worked. The Tudors had made parliamentary supremacy absolute, but it was the supremacy of Parliament guided and even governed by the Crown; there were important areas of government on which neither House could encroach without royal invitation, and, in particular, the relations between the Legislature and other organs of Government and between branches of the Legislature were considered to be immutable. Who was to define those relations, if doubt should arise? It might be the King, or the King's judges. What the seventeenth century settled was that it should be Parliament, and that, in the event of dispute in Parliament, the majority of the House of Commons should be able to enforce its view.

As good examples as any of what is meant by omnicompetence (that is, in Dicey's words,[1] that Parliament has 'the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament') may be found in the instances where Parliament has of its own mere motion extended its

[1] *The Law of the Constitution*, p. 38.

own authority. The classic case is the Septennial Act.[1] In the year 1716, just after the Jacobite rebellion, the Government judged that a general election would imperil not merely the existing ministry but the Hanoverian settlement. Under the Triennial Act of 1694 a general election was inevitable not later than 1717. Parliament was therefore induced to pass a Septennial Act, extending its own term by four years. Dicey does not exaggerate when he says that the 'Act proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the State, and the Septennial Act is at once the result and the standing proof of such Parliamentary sovereignty.'

Even more striking is the story of Parliament's prolonging of its own life during the recent war; more striking because of late years so many theorists have attacked the conception of parliamentary sovereignty, because there has been such a development of the theory of delegation, the theory that the Members of the House of Commons have authority to do only those things for which they

[1] Ibid., p. 42., *et passim.*

have received mandates at election, and also because of some of the uses which the War Parliament made of its self-bestowed authority. The course of events was as follows: in December 1915 a Bill was introduced to keep the existing Parliament (which, under the Act of 1911, must expire in January 1916) alive for another year; in committee the period of extension was reduced to eight months, and so the Bill passed. In August 1916 Parliament was similarly reprieved for another eight months, and thus it lived on from reprieve to reprieve until, at the moment selected by the War Premier, in December 1918, it was dissolved. Here was a Parliament elected with no thought of war (except that perhaps a very few of its majority may have owed their seats partly to their promises to treat war as impossible, and a few others to their championship of increased naval construction), kept alive to deal with the war when it came (although it might have been argued, unfairly perhaps, but not preposterously, that if it had been a different Parliament there would have been no war, while it was much more difficult to argue that any new Parliament must necessarily be less suitable for the prosecution of the war, now that war

had to be prosecuted). Moreover, this Parliament thus rejuvenated was not content with one draught of the elixir, but indulged itself with repeated sips, until military victory enabled its moving spirit to offer the mass of its members an ampler supply of a headier beverage ; nor did it limit its activities to the purposes for which it had granted itself a certificate of competence and a prolongation of life. However much it had to do with winning the war, for which popular approval of that purpose and acquiescence in Parliament's prolongation may have given it a sort of mandate, it certainly had everything to do with a series of great constitutional and social innovations for which there had been no general or evident popular demand—a far-reaching Education Act, a fundamental rearrangement of the Government of India, and a Representation of the People Act, which had been framed by the extra-constitutional agency of a Speaker's Conference, and which very nearly doubled the constituency by adding to it two million men and six million women.

There could hardly be a clearer example of parliamentary omnicompetence, of the legal power of statute to make anything law, nor a clearer

proof that it still subsists. Other characteristics of the supremacy of statute may be indicated. It can alter what earlier statutes had intended to be unalterable, as when the terms of union with Scotland were varied by later Acts. It can fix the descent of the Crown, as by the Act of Settlement. It can deprive the subject of what he has reasonably supposed to be fundamental rights, as the Administration of Justice Act (1920) has deprived him in a great variety of cases of the right to trial by jury.[1] By Acts of Indemnity it legalises conduct which when it took place was illegal. It might even make illegal, and punish as illegal, conduct which when entered upon was legal. Any particular exercise of power in any of these ways may be wicked and immoral; and, if many such exercises were odious to many citizens, no doubt revolt, and, if there were enough odium, revolution, would ensue; but no legal authority could deny them legal validity.

It is true that this legislative omnicompetence is limited by the necessity of co-operation between three theoretically co-ordinate organs—King, Lords,

[1] A bill has now (February, 1925) been introduced for restoring the old position.

and Commons. But in practice for the last two centuries the King never has stood out, though sometimes he has used his influence in either House, especially in the Lords, to defeat a legislative proposal. Neither in that period has the House of Lords ever resisted the House of Commons to the end, and now it has lost its last chance of doing so. At the time of the Parliament Bill (to limit the Upper House's veto so that it should be merely suspensory), the majority of peers preferred to allow their powers to be reduced by letting the Bill through, rather than to see their order degraded by a wholesale creation of peers to force it through. Yet, even after the creation, they would not have been weaponless; the House of Lords is the lawful judge of its own composition, and they might have refused to allow the new peers to sit and vote. That would have been the end of the House of Lords; but it would have been an end which the Government could not have effected under the forms of law; it would have required revolutionary procedure. The surrender of the Lords is an example of one of the conditions that have made British constitutional development possible—that the possessor of a legal right shall not use it when it

become clear that it no longer corresponds to reality, and that if it is flourished it will be shattered.

In the light of later events, parliamentary omnicompetence and the predominance of the Assembly over the monarch may be regarded as steps towards democracy, but that was no part of the intention at the time, nor for a century after the Revolution could the most perspicacious observer have perceived that such was to be the effect. The House of Commons was not then, and had never been meant to be, representative in anything like the modern sense, that is, designed to reproduce in numerical proportion the political wills of individual Englishmen. It represented landowners in overwhelming preponderance; as has been fairly said, the 'Glorious Revolution' substituted for the divine right of kings the divine right of freeholders. The men who made the Revolution Settlement and the men who, in the following generation, got it to work, had no mind to democratise the constituency or to reduce the influence of property, and indeed, by a series of deliberate devices and practices, the predominance of the freeholders, and especially of the large freeholders, was increased and protected.

This accession of the landlords to the mastery of

English Government, their remaining in that position for a century and a half, and the time and manner of their being forced to leave it, are all examples of one of the few valid generalisations about politics and of one of the felicities of modern British constitutional development. The generalisation is this: that a State is stable and undistracted only when the possession of political rights pretty closely corresponds with the control of real, and above all economic, resources; the man who did most to make this truth clear and available was Harrington, whose experience was in the time of Charles I and Oliver Cromwell. The felicity is this: that in the British State, during the last two hundred years, whenever social changes have destroyed this correspondence, the readjustment has been made without violence. It is due principally to these causes: society in Great Britain has always been extremely fluid, and political parties have never been identical with social classes; individuals have been, on the whole, ready to trust their fellow-countrymen, and few of them have thought any political principle worth bloodshed, except private liberty and national independence, on which they have been, in the mass, agreed.

At the same time, it must be remembered that the 'Glorious Revolution' was not quite bloodless, and that two attempts were made by force to reverse it, in 1715 and in 1745. Yet these attempts were never popular in England; there was a sentimental kindness for the legitimate claimant and a great deal of dislike of the ruling clique, but neither the one nor the other was so rooted in principle or interest as to make fighting worth while.

There were special reasons for this lukewarmness. For our purposes the most important is the introduction of a new principle into constitutional practice, the principle of toleration. Tudor Governments and early Stuart Governments had assumed that it was their duty to regulate all the concerns of their subjects; a considerable, and eventually triumphant, section of their subjects had found intolerable the way in which the King did some of this regulation; at first they had thought that if only the last word could be given to some other authority, all would be well; gradually it was brought home to an increasing number of bosoms that there were some concerns in which interference by the Government, however constituted, was intolerable, and during the interregnum experiments

were made in withdrawing some subjects from governmental competence by express enactment unrepealable by ordinary legislative methods.

This device was to have a great future in other countries, especially America. It did not obtain a permanent place in the English State, but nevertheless the trial of it was not without effect. After the Restoration, one of the conditions of endurance of any Government was that it should not exceed a very low maximum of interference with social habits; another was that it should not persist in the attempt to force all subjects into the Church. Charles tried to regularise this condition, and failed because Parliament had not yet perceived that it was a condition; James approached the problem with hopeless ineptitude, and broke himself over it; in the Revolution settlement the necessary minimum of toleration was made statutory. And it must be remembered that the success of that settlement was due even more, and much more, to the relief gained by the Church than to the relief gained by nonconformists. It was to save the Church of England that the Revolution was made; there were other motives, too, but that was the chief; and the first condition of its success was

that the Church should be unmolested; freedom of worship for dissenters was a minor matter, the price that the Church paid. To put it in another way, one (I think the chief) of what may with any fairness be called the *national* demands which conditioned the Revolution settlement was 'Hands off the Church.' And it remained a most potent political cry for generations.

It was in their consciences and their pockets that seventeenth-century Englishmen were most sensitive. For this tenderness they have been absurdly overpraised; the best people are not habitually occupied with either consideration. But the tenderness did have this invaluable effect, that it brought into English constitutional practice what the Great Rebellion had brought into political thinking but failed to bring into law, the notion that Government is tolerable only when it leaves some things alone. The effect was specific with regard to religion; it was less definite, but still real, with regard not only to social habit but also to finance. In taxation, as in legislation, Parliament was sovereign; but with Parliament in the hands of a numerically small class such power was tolerable only on condition that it was moderately

exercised, that taxation remained on the ancient and accustomed basis; large fiscal innovations would be effected only with difficulty, as in the case of the Bank of England, or not at all, as in the case of Walpole's excise scheme.

This limitation is a reminder, if not of another of the principles of the modern British constitution, at least of one of the necessary conditions of its development. After the accession of the Hanoverians it was not merely a class which controlled Parliament, but the Whig Party within that class; and one of the fixed points in the policy of Walpole, the greatest of the Whigs, was to keep the land tax low in order that Tory squires might not be filled with more discontent than they could vent by harmless grumbling. This spirit of complacency for opponents between parties was one of the factors which made possible the use of representative institutions to secure responsible government; that use is the main interest of the eighteenth century for the constitutional student.

It is easy enough to say (as I have said once already) that Englishmen are naturally inclined to trust one another, but this sort of explanation of history by unverifiable assertions about national

character is not very helpful; in the case under consideration it can be supplemented with something more specific; Whig and Tory were not divided by any difference to make the extremes of hostility inevitable, like the difference between Republican and Monarchist, Jacobite and Hanoverian, Socialist and Individualist, Romanist and Independent.

Such an assertion requires some support. Tory and Whig were originally names given by their enemies to the opponents and supporters of the proposal to exclude James Duke of York from the succession. Here was a fundamental controversy; the first round went to the Tories, and James succeeded; when, later, he was expelled the Whigs might seem to have won the return match, but the appearance does not fit the facts without qualification; the truth is that the mass of the Tories were converted, unwillingly and not quite consciously, to the policy of their opponents. Nor were the differences that subsisted between them absolute. Toryism was the party of Church and King. But the Whigs had learnt, and were to be reminded, that they must abstain from frontal attacks upon the Church; they might use patronage

to officer it with prelates whose pretensions were scarcely prelatical and whose dogmas were but slightly Anglican; they could not alter its formularies, recast its liturgy, or destroy its privileges. In the time of William, moreover, the Whigs were more monarchist than the Tories, and even in the darkest days of Whig dominance they tried to put the Crown in their pockets and not on the scrap-heap; as soon as, with the accession of George III, the Crown was again worn by a monarch for whom the Tories could once more feel something like whole-hearted respect, the 'Venetian oligarchy' was doomed; the more so because, besides the Tories, a considerable number of Whigs also rallied round the Crown.

It is not meant to suggest that there were not real differences between Tory and Whig, but they were not the sort of differences which every honest man must feel, and no honest man could compromise, and they were made to appear much greater than they were by the success of the Whigs in persuading the world, and especially the Georges, that there was no distinction worth making between Tories and Jacobites.

What is asserted is that there were no questions

which either Whigs or Tories felt it quite intolerable to leave to their opponents; with the Jacobites and Non-jurors it was different, but they were always less than a national party, and dwindled into a hopeless sect. Between the Revolution and the Reform Act, the questions most nearly of that order were raised by the prosecution of Dr. Sacheverell, in which the Tories saw an attack upon their Church and an insult to their political principles, and by the continuance of the war against Louis XIV, in which they saw the effusion of English blood for the advantage of Dutchmen and Whigs. In both these cases Whiggery might have become insupportable, but in both Toryism triumphed before Tory patience had snapped.

So it happened that for generations party government was tolerable, although it was based on a House of Commons which, to modern eyes, seems to have been laughably and hatefully unrepresentative. What brought those conditions to an end must be enquired later; the next thing to consider is their part in the development of perhaps the greatest of all England's political inventions: that is, responsible government.

CHAPTER III

THE SOVEREIGN PARLIAMENT AND MINISTERIAL RESPONSIBILITY

REPRESENTATIVE institutions are common enough; not merely is this true of the modern world, but history is littered with representative institutions; *Cortes* in Spain, *États-Généraux* in France, diets in Hungary, and so on and so on. It is not a liberalism producing and fostering representation, but a conservatism clinging on to it that has been the peculiarity of English development; and the attraction which brought the modern world back to representation was the effective English use of it to secure responsible government.

Ministerial responsibility as it is understood in modern England contains many elements: the first, in time and in importance, are criminal responsibility—that agents of the Government should answer for the breaches of law in the same way as anyone else—and responsibility for policy—that for a governmental act, judged immoral or impolitic

though not illegal, there should be someone liable to effective censure. Of these elements the criminal may be touched very lightly here; it suffices now to remark that a large part in its establishment was played by impeachment, of which the essence was trial before the House of Lords as a court, with the House of Commons as prosecutor.

Impeachment contributed to the realisation of the principle of political responsibility also. The courts were the King's courts, and that alone was reason enough for the maxim that the King could do no wrong, a maxim which made seventeenth-century reformers maintain as long as possible (and longer) the fiction that all the wrong which they believed to have been done was the work of ill counsellors against the true will of the King, and which made perfectly illegal and unconstitutional their punishment of the King, when at last, after a generation of floundering in fiction and illogicality, they beheaded King Charles I, and when, after another generation of fierce controversy and foul conspiracy, they excluded James II and his heirs. Meantime, however, they had arrived at what was to be the ultimate solution—the rule that with every decision of policy and administration some official must be

identified, and that for such a decision the minister must be accountable.

It was already well settled that the Crown could act only through the known and appropriate channels, that as its judgments could be uttered only by the courts, so its major acts of State could be validated only by the Great Seal, lesser acts by other seals and signatures. Since the case of Danby (1679) it has been certain that the official keepers of these instruments are accountable for the use of them, and the agents of policy for their acts, even when they have acted under the direct and express command of the King. Danby had written to our Ambassador at Louis XIV's Court letters instructing him to negotiate with that monarch in a manner of which the Commons, when it came to their notice, highly disapproved. Poor Danby disapproved equally, and had written the letters only at the urgent command of the King and under the protection (as he thought) of postscripts in the royal hand: 'I approve of this letter, C.R.' This did not save him from impeachment for high treason, and when, in answer to it, he pleaded a royal pardon under the Great Seal the Commons resolved that a pardon ought not to be pleaded in bar of an

impeachment (that is, to prevent trial and judgment), a resolution which the Act of Settlement (1701) reinforced with statutory effect.

Another case of the same tendency was the impeachment (also in 1701) of Lord Chancellor Somers, who had affixed the Great Seal to blank commissions which William III had used in pursuance of a foreign policy disagreeable to the House of Commons. Somers, indeed, was acquitted, and the charge against Danby had never been pressed to a conclusion; but since their cases it has been clear that Ministers must answer for acts of policy done through them, and cannot plead royal commands in justification. Moreover, in spite of the failure of the prosecution in each case, in each case there was, in effect, imposed the penalty which modern practice has approved for Ministers committed to policies not supported by Parliament: that is, loss of office. And it should be noted by the way (as additional evidence of what was said earlier, about the approximation of Whiggism and Toryism) that the restrictions of the royal prerogative in 1701 were the work of a predominantly Tory Parliament.

The claim that Ministers should be responsible

was older than Parliament. What was new at the beginning of the eighteenth century was that there was now a claimant, the House of Commons, which was unrivalled, voracious, and irresistible in the matter. What was still needed was a method of enforcing the claim without imputing illegality to the obnoxious Minister. As has been seen, the responsibility to which Danby and Somers were called was in form criminal; it was necessary to allege not merely that their policy was bad, but that their conduct was treasonable. This was false and clumsy; the penalty was difficult to enforce, and much too heavy when it was enforced. It was a means of securing political responsibility, but only in an occasional, and almost casual, manner.

That no more than the suitable penalty should be inflicted, and that it should be inevitably inflicted—in other words, that a Ministry enjoying the confidence of the House of Commons should wield all the power of the State, and that a Ministry no longer trusted should no longer rule; such is the idea of responsible government. Its realisation in Britain (doubtless never quite complete) is inseparably connected with the creation of the

Cabinet, as a means alike for the representative assembly to control the executive officials and for the executive officials to exploit the representative assembly.

It may be as well to begin at the end, by enumerating the characteristics of the developed Cabinet, and then to indicate how they got fixed in constitutional practice, and how the combination of them made the Cabinet.

The Cabinet is peculiar, even among English political organs, for want of definition. Here is an institution, the most characteristic and perhaps the most important of English government, which came into existence outside the law and, in some respects, against its intentions. Its functions, powers, and obligations have never been imperatively described. The sanctions and limitations of its power are dependent on factors so complicated and various that its nature and behaviour are not constant. As good a method as any of specifying the standard Cabinet is by quotation from Lord Morley, who was not only acquainted with history and political philosophy, but also experienced in the matter of which he spoke.

'The principal features,' he wrote in a book[1] published in 1889, and continually reprinted till 1913, 'of our system of Cabinet government to-day are four. The first is the doctrine of collective responsibility. Each Cabinet Minister carries on the work of a particular department, and for that department he is individually answerable. . . . In addition to this individual responsibility, each Minister largely shares a collective responsibility with all other members of the Government for anything of high importance that is done in every other branch of the public business besides his own. . . .

'The second mark is that the Cabinet is answerable immediately to the majority of the House of Commons, and ultimately to the electors whose will creates that majority. . . .

'Third, the Cabinet is, except under uncommon, peculiar and transitory circumstances, selected exclusively from one party. . . .

'Fourth, the Prime Minister is the keystone of the Cabinet arch. Although in Cabinet all its members stand on an equal footing, speak with equal voice, and, on the rare occasions on which a division is

[1] *Walpole*, 1913, p. 154.

taken, are counted on the fraternal principle of one man, one vote, yet the head of the Cabinet is *primus inter pares*, and occupies a position which, so long as it lasts, is one of exceptional and peculiar authority. It is true that he is in form chosen by the Crown, but in practice the choice of the Crown is pretty strictly confined to the man who is designated by the acclamation of a party majority.'

A fair impression of the conception of the Cabinet which has been orthodox for the last half-century is obtained by adding to Lord Morley's analysis two short quotations from Walter Bagehot and Sir Sidney Low. 'The necessary essence of the Cabinet,' says Bagehot,[1] is to be 'a combining committee—a *hyphen* which joins, a *buckle* which fastens, the legislative part of the State to the executive part of the State.' He adds that 'the most curious point about the Cabinet is that so very little is known about it. The meetings are not only secret in theory, but secret in reality.' Sir Sidney Low[2] also insists upon this last. 'Secrecy and partisanship,' he says, 'are elements of Cabinet Government,' and from the context he seems very

[1] *The English Constitution*, Nelson edition, p. 85.
[2] *The Governance of England*, 1918 edition, p. 34.

near to thinking that they are the decisive elements.

A Cabinet, then, may usefully be defined as a secret partisan committee directing policy and administration under the leadership of the Prime Minister, and under the control of the majority in the House of Commons. This is very different from English government before the eighteenth century, and from every other government in all history, except such as have been imitated from nineteenth-century England. How did it come into existence?

The main line of development has been in connection with ministerial responsibility. After the Restoration, for reasons which have been already partly indicated and whose consideration would take us too far, the nation was divided into two parties, of which even the one specifically monarchist was increasingly eager to control the King in his historical right and duty of directing policy and administration. The Revolution made that eagerness increase all the more rapidly when the King to be controlled was a Dutchman. At the same time the lesson was being continually reinforced that a Government which wanted its business done, which wanted especially money to do it with, must

get the co-operation of Parliament, and that the only safe way to get it was to employ Ministers who could count steadily upon a majority in the House of Commons.

Thus it happened that William, and later Anne, with every wish to avoid partisanship, were reduced to the necessity of partisan Ministries. The first Georges could not attempt not to be partisan, and had not even the resource of alternating the parties; for them it was the Whigs or nothing; the only uncertainty was between the sections of the Whigs, and the triumphant faction not merely vetoed the royal appointments, as, in effect, the majority of the Commons had done since the Restoration, but actually refused the King any veto on its appointments, as when the elder Pitt was forced into the Cabinet. The majority in the Commons, then, was the main factor in the making and unmaking of Ministers, as can be read in every passage of the history of Walpole and of Newcastle.[1]

[1] But it is not suggested that royalty was not still a factor In the eighteenth century there was habitually an inner Cabinet, which was the real director of policy, and it was only into the outer that Pitt was forced one of the forces against the King in George II's reign was the Court of the Prince of Wales, an essentially royal factor. An important factor in the House of Commons was the notion that normally it was a duty to support the King's Government.

It has remained so ever since, in spite of all sorts of changes in the character of the House of Commons. It may be alleged, not without truth, that eighteenth-century Cabinets were compounded much more by the House of Lords, or by George III, that twentieth-century Cabinets depend much more on organised labour, or the electorate, or even on trade union bosses, or caucus leaders, or Fleet Street millionaires. But these truths are partial. George could make or unmake Ministries because he could beat the Whig grandees at the game of nobbling the Commons, and for no other reason, and the end of all his making and unmaking was that there was once more a House of Commons divided into two organised parties, of which the larger was beyond nobbling—was able, through its leader, to dictate the formation and the destruction of Cabinets. So in our own day: it is often argued that the Commons merely register the decision of the electorate, a decision which could be as well transmitted by any other means; that the House's decision, once registered, is never changed till it is forcibly upset by another General Election; that the behaviour of Ministers is influenced much more by newspaper agitation, by pressure from trade

unions or capitalist organisations, by the reports of party managers, than by any consideration of the House of Commons.

It is certain that the modern House of Commons is controlled in its choice of a Prime Minister, if not by the will of the people, at least by the votes of such of them as think voting worth while; but still it is the House which is the criterion, and if the House is itself an effect of the rest of the universe, so it always was, and so is everything else. It is by no means certain that any other method of discovering the choice of the electors would produce identical results. Would another method have made Mr. Bonar Law Prime Minister, or Mr. Baldwin, or Mr. MacDonald? It is at least doubtful in each case The factors controlling the Commons change all the time, but for two centuries it has been the practice of the constitution (or for something over one century what may fairly be called a principle, an universally accepted convention) that the Commons should have power to designate the Prime Minister, and that he should nominate his colleagues, provided he chooses persons agreeable to the Commons.

Something similar may be said also of the House's

destructive, as of its creative, power over Cabinets. A House once elected was, towards the end of the nineteenth century, less likely than formerly to change its party complexion, but (as recent experience has shown) a General Election may still produce a Parliament capable of turning out a Government which it has itself brought in. As for the influence which the House exercises upon a Cabinet in being, its continuous power over Cabinets, both the extent and the permanence of the diminution of this also may be held to have been exaggerated: that is a matter which, if there be space, may be dealt with in other connections. But a word may be said here of some recent developments.

It has been shown that the partisan character of the Cabinet is of its essence, and, at so late a date as this, there is no need to insist that 'the English Cabinet is a Party Committee,'[1] that its dependence is only nominally on the House of Commons, really on a party within it. Still, that Party has always been a Party of the House, its members owing their political importance (and even existence) to their relations with the House, and the Party as a whole flowering into a Government because it

[1] Low, op. cit., 34.

controls, at worst a passive, and normally an active, majority of the House. To say that the Cabinet depends not on the House of Commons, but on a Party in the House, is little more than to say that an assembly of six hundred men will not be habitually unanimous, and that, if it is ever to act as a unit, there must be some organisation of individual wills and opinions.

It is true that there has lately been a development of partisan organisation tending to break the habitual and legitimate relation between Parliament and Government. There has been[1] a committee, composed mainly of back-bench members of the Party in office and partly of Ministers, which has held fortnightly secret meetings, with the purpose of securing correspondence between the conduct of the Administration and the wishes of its supporters in the House of Commons. This purpose has no novelty or impropriety.

To the machinery adopted it is an objection, but not the essential objection, that in this case the Party concerned was not in a majority, and was not even the largest single Party. A more fundamental

[1] In the Parliament of 1923–24 cf., e.g., *The Times*, October 27th, 1924.

objection is to the setting up of machinery outside constitutional practice, and withdrawn from public observation, so that a section of the Commons is controlling Government, in an unascertainable, but not inconsiderable, degree, in a manner that was scarcely foreseen, and can hardly be checked by the electorate. Another fundamental objection is the suspicion that the Committee, or a portion of it, may exercise influence less as representing a section of the House, than as voicing opinions or standing for organisations very slightly connected with Parliament, and almost unknown to the electorate.

No doubt the course of a Minister, and even of a whole cabinet, has often been deflected by private pressure: but such deflections, generally objectionable in their consequences and flagrantly undemocratic in their nature, have been always dissembled as transgressions, never defended as a practice, still less elevated into a principle. The true principle, established in the eighteenth century and followed in the nineteenth, is clear. There should be a real and avowed Cabinet, explaining to Parliament how and why it acts, and leaving office when its explanations are not acceptable. It should have no other responsibility, except the legal

responsibility to the Crown which it shares with all subjects, and the indirect responsibility to the electorate which is involved in its responsibility to the House of Commons.

The Cabinet's dependence exclusively on Parliament for office and power may be said to have been completely and finally established by the vicissitudes of Lord Melbourne's Ministry in 1834 and 1835. Here was a Ministry with a safe parliamentary majority dismissed by the King, and an Opposition politician with no reasonable prospect of a majority invited to form a Government. What the King's motives were, and whether the dismissal were not welcomed or even invited by Lord Melbourne, need not here be enquired. The importance of the dismissal for the present purpose is not its causes, but its consequences. Sir Robert Peel was at the time far away, he did not know what was happening, and could not be consulted about what should be done. Yet, when he accepted the royal commission to form a new Ministry, he admitted that he thereby assumed responsibility for the destruction of the old one, and, when he found that in a new House of Commons he was still in a minority, he gave up the attempt.

There was nothing new in the necessity of parliamentary support. It had been unmistakable and inexorable throughout the eighteenth century, and earlier. This did not mean that eighteenth-century kings had no share in choosing their Ministers. They had a very large share in determining the composition of Parliaments, and their motives after they were composed, a share comparable (for instance) with that possessed by the trade union managers nowadays. This power they could, and did, use to make Ministries come and go, a use of which George III's substitution of Pitt for Fox, in 1783, is the leading case.

In William IV's case there is something essentially different. The dismissed Ministers had suffered no parliamentary defeat of any kind, and the King had no longer any considerable influence over the election of Members or their political conduct when elected. Moreover (and this is the consideration of capital importance to the present purpose), the thing has not been done, could not be done, since. The fairness with which Wellington acted as a provisional Government, after Melbourne was dismissed, and before Peel could reach London, the promptitude and unreserve with which Peel, on accepting the

King's invitation, admitted his consequent retrospective responsibility for his Majesty's whole course of conduct, the moderating effect of Melbourne's character and circumstances, all these factors saved the attempt from being disastrous, but even they could not save it from being unsuccessful.

No king was, or is, likely to try it again : it is just possible to conceive, but not to expect, circumstances in which a Cabinet with a parliamentary majority might be resolved on action so clearly disagreeable to the mass of the electorate that the monarch might decide to dismiss his Ministers, and might find a leader of Opposition willing to answer for his decision. But such a possibility is scarcely within the range of practical politics ; and it may be said to have been settled since 1834 that nothing of a constitutional character can remove a Ministry secure of a majority in the House of Commons, or prolong the life of one not supported by at least the acquiescence of such a majority.

CHAPTER IV

MINISTERIAL RESPONSIBILITY AND CABINET GOVERNMENT.

THE nature and origin have now been indicated of one essential characteristic of an English Cabinet—that it is immediately answerable to a majority of the House of Commons. This does not mean that a Ministry must resign (unless it prefers to obtain a dissolution of Parliament, an alternative which will be examined later) on any defeat, but it does mean that it may make any defeat an occasion for resignation if it chooses, and may use this as a threat to induce a majority to vote as it wishes, and also that it can be forced to resign (or dissolve) if there is a majority determined on that result.

For illustrations of what is here meant there is no need to look further than the Parliament of 1924. Mr. Ramsay MacDonald's Government was defeated a dozen times, and yet it remained unmoved, and apparently untouched. The public had grown so thoroughly accustomed in the previous generation

to Ministries with absolute and well-disciplined majorities, Ministries which could not tolerate anything less than omnipotence, that it had supposed every adverse vote must precipitate a Cabinet crisis, and was now inclined to believe that ministerial dependence on Parliament was a superstition which Mr. MacDonald had exploded. If he could survive a dozen defeats, why not a score, or a hundred? There was even in some minds a notion that the Prime Minister, by ignoring an unwritten rule, was altering the whole character of the game, much as the Americans took Rugby football and, by merely ignoring tradition and differing in ethical preconceptions, made of it something essentially new.

These doubts and questionings were encouraged also by some writers on the constitution, who have argued in general that Parliament's power of creating and destroying Ministries is hardly real, and in particular that it is now obsolete. As to the first, the text-books are accustomed to assert that the ultimate sanction resides in Parliament's power to make government impossible by rejecting the annual mutiny bill or the annual finance bill. It is easy to show that in fact this power has never been so

exercised, and to argue that in any case it cannot give a continuous control, since, if that were all, the mere passage of these Bills in any given year would mean the conferring of a temporary licence on the existing Ministry. Similarly, it could be maintained until the other day that the last case when a vote of the House of Commons occasioned a change of Government was Lord Rosebery's resignation on a trivial detail of Army Estimates in 1895, and that even then the vote was not the real reason for the resignation.

But in 1924 the existence of a Parliament in which no one Party had an absolute and homogeneous majority (the normal state of affairs, after all, if the history of the last two centuries be regarded) has provided a modern instance of a House of Commons vote producing a dissolution on the advice of a Premier only nine months old in office, and that Premier's resignation as a result of the consequent election. And the general argument from the tractability of the House in the matter of Mutiny Acts and Budgets is also fallacious. The ultimate sanction against card-sharping in a club is expulsion. No doubt the reasons why most of the members do not cheat are different. Even

on the rare occasions when cheating is detected, it may hardly ever happen that resort is had to the formalities of expulsion ; there may be other means of getting rid of the offending member. In the same way a Cabinet may resign without waiting for an adverse vote, or it may hang on in spite of an adverse vote ; but it is ultimately true that its existence depends on the House of Commons, and that the reason is the House's power to mark its displeasure by making the work of government impossible, and it is a fair way of emphasising that truth to say that the House of Commons possesses the practical power to dismiss Cabinets because it can make public expenditure impossible, or render the forces of the Crown impotent

This is one primary and necessary element—indeed, *the* necessary element—of English Cabinet government. Something has been shown already of its connection with Party solidarity and collective responsibility, but there remain still some things to say on those subjects.

Cabinet solidarity, as understood nowadays, may be dated from the Ministries of the younger Pitt. Unanimity between Ministers was one of the objects for which Walpole strove, not altogether

in vain; but it was an object of personal convenience, not a principle of political decency, the attempt of one man to get his own way, much more than the attempt of a conception of politics to get itself realised; it was, besides, an object only very imperfectly attained. Walpole got rid of colleagues with wills of their own when he felt that he could do without them, but from those who were indispensable (notably Newcastle), he had to endure independence, and even opposition.

When Walpole left office because his parliamentary majority had left him, his colleagues had so little sense of identification with him that most of them stayed behind, nor did the rest of George II's reign do much to establish Cabinet solidarity. One element in it, indeed, was notably exemplified when a Ministry controlling a majority of the House of Commons was able to force into Cabinet office the man whom the King most detested, especially when (in this process of bringing in Pitt) for the first time a Ministry resigned *en bloc*, and for the purpose of coercing the Crown.

Newcastle at the time denied that the wholesale resignation was concerted; in any case it shows that the subordinate Ministers thought it better

to go out of office with the Pelhams[1] than to remain in without them. No doubt their preference arose rather from a calculation that the best chance of the most loaves and fishes lay in sticking to Newcastle and his brother, but at least that was one sort of solidarity.

In some respects, however, the tendency was the other way. Walpole disliked the title and certainly did not hold the office of Prime Minister, yet he had a good deal of a Prime Minister's position; he was an individual specially followed by the Commons and trusted by the King, and therefore standing in a special relation to the Crown and to the Ministry. From his fall to the accession of George III there was no one man who stood in that relation; there was no one who had a Prime Minister's position, or there were two or three at once—Carteret and the Pelhams, the Pelhams and Hardwicke, Pitt and Devonshire, Newcastle and Pitt. Moreover (and partly in consequence), instances multiplied of individual Ministers resisting Government policy—Pitt, for instance, denouncing the Hessian subsidies, and Henry Fox fighting Hardwicke's Marriage Bill.

[1] *i.e.* Newcastle and his brother.

George III wished to be served by Ministers chosen by himself because they would be serviceable, and not by a Premier because they conformed to a party programme. The latter alternative was, indeed, as an idea not yet explicit, and as a practice not yet established. To choose statesmen for their usefulness to the King was not less constitutional than to choose them for their usefulness to Newcastle. The Earl of Chatham (as Pitt became in 1766) desired, like the King, to see the dominance of Party destroyed. It is probable that the people was of one mind with the King and the Earl, so far as it can be said to have had a mind on the subject.

For the first ten years the King got his own way more or less and off and on; for the next twelve he had it with something approaching completeness. At the end of that time the American Colonies were lost, England's position in the world was worse than it had been for a century, if not for centuries; it was clear that no politician would again try to serve the King as North and Bute had done (or even George Grenville), and that, in any case, such an attempt would be frustrated by the House of Commons.

Even so the Crown was not yet as tightly gripped by Party as it had been in the seventeen-forties and 'fifties. Rockingham was the leader of the orthodox Whigs, and their orthodoxy had been crystallised and intensified by ten years of opposition. Yet he took office as the result of a negotiation which was carried on by Shelburne, who was by no means orthodox, and one of whose terms was the continuance as Chancellor of Thurlow, the King's man, ready to betray his colleagues whenever the King could persuade him that it would be to his advantage. Rockingham's death, a few months later, left the pre-eminence to Shelburne, incapacitated from being the leader of a Cabinet by his Chathamite principles and by the general distrust with which he was regarded.

Shelburne's Government corresponded to 'the Cabinet system' in one respect at least, that its end was caused by failure of House of Commons support. It was succeeded by the unnatural coalition which had defeated it, the alliance of the King's man North and the Whig Fox. North as a renegade, and Fox for that and many other reasons, were of all politicians the most odious to George.

They did not last a year; and they went out not because of anything that happened in the Lower House, but because the King, having induced the Lords to throw out their India Bill, made that an occasion for dismissing them.

At first sight this seems like a great triumph for the monarch and a great set-back for the incipient Cabinet system. The first it certainly was; but what followed made its significance something more and something quite different.

George III, after twenty-three years of generally successful struggle against party, had had imposed upon him by party control of parliamentary strength a Ministry as hateful to the King as any which had been forced upon his grandfather. Within nine months his own uncontrolled will, directing his own resources, had destroyed that Ministry and put in power his own nominee, William Pitt, a young man with a great name and already some official experience, but with very little party backing. Nevertheless, Pitt's tenure of power marks not a reversion in the evolution of English government, nor even a check, but an advance, and a definitive advance; and that specifically in the development of these two principles—closely connected with

each other and with the history of party—first, the principle of Cabinet homogeneity and solidarity, and second, the principle of the predominance of the Prime Minister.

The Whig doctrine—that the Government of England should be directed by a Party Cabinet, headed by a Prime Minister who could rely on the votes of more than half of the House of Commons, and that the King should reign—but in no way govern—had gained definition and driving-power in the struggle against George III's attempt to revive the influence of the Crown. That doctrine was now flouted by the dismissal of Fox and North, and still more by Pitt's persistence in office in spite of a hostile Lower House ; yet his Ministry was to prove the decisive process in converting the doctrine into the effective rule of the constitution.

The most striking part of this process was the change by which the majority from being the King's became the Minister's. It is the more striking because it contains an element of paradox. Pitt was a Minister made by the King, if ever there was one ; he could not claim to possess parliamentary power and prestige fitting him to dominate that assembly ; he had almost no party to support him ;

he was some sort of a Whig, rather a progressive and liberal sort, yet he came in by a very dubious exercise of royal influence and prerogative. Nevertheless, he was the first Premier to rely upon a parliamentary support independent of the royal favour, and every subsequent Premier has done the same.

Pitt resembled his illustrious father in this, at least, that his power was more directly connected with the approval of the British people than had been that of any other Minister. Eighteenth-century general elections were necessitated almost invariably by the natural decease either of Parliament or of the King. The general election of 1741 was the first which was fought to determine the fate of an Administration, and it was not till 1784 that, for the first time, Parliament was actually dissolved in order to settle such a question. This was (perhaps not as much as under modern arrangements, and certainly far less than in the modern idea, but still with some degree of reality[1]) an appeal to the people. It was at least an appeal to what electors there were, and, though undeniably the success of

[1] Cf the *Private Papers of John Robinson*, 1774–1841, ed. W. T. Laprade, and J H. Rose's comments in the 'Rout of a Coalition,' contributed to the *Nineteenth Century and After*, March 1924.

the appeal owed much to the money and influence with which it was backed by the Crown and by others, still there is evidence enough that it owed something besides to national feeling ; and, anyway, the successful appeal to Parliament's constituency against Parliament contributed largely to equip the Premier with rights and powers enabling him to be a principal factor in making the Cabinet a unity and, in every sense but the legal, a corporation.

To this equipment Pitt's tenure of power contributed even more than his accession to it. The normal distribution of forces in the House of Commons had been something like this : a third supporting the Government, a third opposing it, and a third supporting it momentarily, but ready to oppose the moment the King (or anyone else) could persuade it that opposition was more profitable. The King's means of persuasion had been much reduced by the ' economical ' reform of which Burke was the principal champion. Further reductions of the same sort were made by Pitt. George's own private party in Parliament, the ' King's friends,' gradually and indescribably, but quite effectively, became Pitt's party—' the Pittites.' Moreover, the Crown's personal interference in party politics

dwindled and ceased, by reason, first, of George's reliance on Pitt, then of his incapacity, then of the character of his successor, and lastly (after 1832) because of the change in the constituency. Thus the ground was cleared for the marshalling of political forces under the Prime Minister and the leader of the opposition. The clearing had been greatly facilitated by Pitt's leadership not merely of the majority in the House of Commons, but of the mass of the nation, by the fact that the revolutionary wars made government national in England as well as in France.

The essential characteristic of the Prime Minister's position is his right to choose the other Ministers, as the essence of his power is the indispensability conferred upon him by the turn of party politics. As in this latter respect, so in the former also, Pitt's career was of decisive importance. George III's efforts to control the composition of Cabinets had won a great success in Pitt's accession to power; even at their least successful they had always been effective enough to secure the admission to the Cabinet of at least one royal nominee, habitually to hold the Chancellorship, the most dignified of all offices, with a special relation to the King's

person and a special need for more than party qualifications. The possession of these qualifications, combined with an unscrupulous subservience to the Crown, had made Lord Thurlow a continual Chancellor, a blessing to his royal master and a curse to his political colleagues. In 1792 Pitt, determined to be cursed with him no longer, gave George the alternative of authorising the dismissal of the Chancellor or accepting the resignation of the Premier. It was Thurlow who went, and though the Crown's preferences have no doubt influenced the composition of later Cabinets, yet since that time no monarch has made a Minister. Moreover, Thurlow went when he did because he opposed Pitt's Sinking Fund Bill, and because the King would not part with Pitt, so that here are illustrated also the Cabinet's homogeneity and the Premier's indispensability. Homogeneity, indeed, and the intimately connected principle of joint responsibility, had already received a notable reinforcement in the precedent set by Fox and North, and followed by Pitt, of discontinuing the double Cabinet previously habitual. In this arrangement the outer Cabinet might contain great and hardly political personages like the Archbishop of

Canterbury and the Lord Steward, and collective responsibility could with difficulty be affixed to a Cabinet so composed.

The disappearance of the outer Cabinet and the Prime Minister's sole right of admitting to the inner Cabinet were illustrated in the year 1801. When Addington succeeded Pitt as Premier, Eldon took Loughborough's place as Chancellor, yet Loughborough continued to claim admission to Cabinet meetings, and Addington found it necessary to tell him that His Majesty considered his 'attendance at the Cabinet as having naturally ceased upon the resignation of the seals,' and that 'the number of Cabinet Ministers should not exceed those whose responsible situations in office require their being members of it.' The force of these rules and the Premier's right to interpret and apply them have not since been doubted.

How well the doctrine of collective responsibility was understood at the beginning of the nineteenth century is illustrated by the parliamentary discussions in 1806,[1] on the admission to the Cabinet of Lord Ellenborough, who was then Lord Chief Justice of the King's Bench. The specific objections

[1] *Parliamentary Debates*, February and March 1806.

to this duplication of function were clearly stated; by Lord Eldon, for instance, who, though he said that it was not illegal, and would not say that it was unconstitutional, yet had no doubt that it was inexpedient, since it was 'not enough that the administration of justice should be perfectly free,' it 'should also be beyond the reach of suspicion'; and by Canning, who argued that 'the holding a situation which was in its nature precarious, and yet an object of ambition, had a tendency to destroy the confidence which resulted from the independence of the judiciary.' Even more significant for the present purpose were the general views on the nature of the Cabinet expressed in the course of debate. The Earl of Bristol held it 'the duty and office of the Cabinet to advise the Crown in the exercise of all its functions To be a member of the Cabinet is therefore necessarily to be a party to all the measures of the Administration.' Lords Boringdon and Mulgrave had no doubt that members of the Cabinet were the responsible advisers of the Crown, and that by that fact the Chief Justice was disqualified from membership. Canning and Temple asserted the responsibility of every individual Cabinet councillor for the advice given by the

whole. Castlereagh asked the House (and especially Fox): 'Is not the Cabinet, in the modern practice of the constitution, as well known to Parliament as if the existence of such a council had been the object of express legislative provision? Have not the members of the Cabinet been always considered by the country . . . both individually and collectively responsible for the measures of government?'[1]

The other side was taken, almost exclusively, by Whigs, and especially by Fox, who went so far as to maintain that the Cabinet was in no way known to the constitution, and that ministerial responsibility was solely the responsibility of a Foreign Secretary for a foreign measure, and so on. The Government gained the division, and the motion condemning Ellenborough's appointment was defeated. Nevertheless, the debate served not to weaken, but to define the doctrine that the Cabinet was a responsible unity, responsible as a unity for all

[1] It had not been so established when George III began his struggle to free the Crown from ministerial shackles. Cf. Earl Granville, October 2nd, 1761 (communicated to the *English Historical Review*, January 1906, by William Hunt): '. . . The King might take a foreign measure with his Secretary of State only, but that if the King referred the matter to his Council, the opinion of the majority of the Council was the measure—the rest was only execution.'

the actions of the Executive. Henceforth that doctrine was orthodox to the point of obligation.

It is to be noticed that the Cabinet to which Ellenborough had been admitted was a Coalition Cabinet, with the Premiership shared, or rather dangled, between Fox and Grenville. This was an arrangement hardly compatible with the Cabinet in the fulness of development at which Pitt had left it; he himself had had no doubt about it, as when he refused Addington's invitation to co-operation on the ground of the 'absolute necessity in the condition of the affairs of this country that there should be an avowed and real Minister, possessing the chief weight in the council and the principal place in the confidence of the King.' The Grenville-Fox arrangement was the only, and that very temporary and partial, later attempt to neglect this rule.

CHAPTER V

CABINET AND CROWN

In reliance on Bagehot, Morley, and Low I have taken the distinguishing marks of the Cabinet to be these: responsibility collective as well as individual; dependence immediately on the House of Commons, and ultimately on the electors; political homogeneity, that is, selection from one party; subordination to a Prime Minister; secrecy; the function of effecting and controlling co-operation between Executive and Legislature.

Some indication has now been given how each of these characteristics (except secrecy) entered constitutional practice; the story of them and their applications is all the political history of modern England; here little more will be said of that story, except to notice some modifications which seem to be important and comparatively permanent, and to refer to the story from different angles so far as is necessary for the illumination of other organs of government—the Crown, for instance, in connection

with which the characteristic of secrecy may be considered.

Of ministerial responsibility, however, it may be useful to say a few more words at this point, because its recent history has been particularly confused, and because its connection with the character and function of the Crown is particularly close.

Collective responsibility is often criticised on the ground that it is absurd for a blameless Foreign Secretary or Chancellor of the Exchequer to be driven from office because of lapses at the Home Office or the Board of Trade. These criticisms are not adequately met by explaining the historical causes of ministerial solidarity, that is, its share in enabling the party controlling the House of Commons to gain control of government. These are the reasons why the thing happened, but there are other grounds on which it has been, and should be, defended. Perhaps the chief is to be found in the virtues of committees—freedom from rashness, one-sidedness, ignorance. For these and other virtues committees have been specially dear to the English people, who have entrusted to them all their local government for the last four hundred years,

and most of their central government too. Now if Cabinet Ministers are to be a committee, and not the mere lieutenants of the Premier for various departments, some degree of collective responsibility must be maintained, and the more effectively the greater the degree. This consideration is reinforced by the progressive lightening in modern times of personal responsibility. In the seventeenth century a Minister who failed might tremble for his head, and in the eighteenth it was much more difficult to regain ground in a political career than to gain it. Nowadays a fallen Minister does not know when he will see office again, but he may be pretty confident that he will some day. The Ministers who in recent years have fallen out, and not either climbed back or been dragged back soon after, are only two or three. To lose office beyond hope of recovery demands ill-luck or dishonesty or incompetence gross and palpable.

If Ministers are to suffer so lightly (and every modern tendency is to lighten retribution), it is the more desirable that they should suffer for each other. That is the best security that the men inside the circle will not admit new-comers likely to lower too dangerously the general level, and that they will

keep an eye upon each other, and do their best to keep the weaker brethren straight.

There have been two recent instances in each of which a Minister was held to an individual responsibility. The first, Mr. Austen Chamberlain's resignation in July 1917, was in several respects exceptional and unfit to set a precedent. It was at a time when the Party system and the Cabinet system were practically in abeyance, the control of policy being centralised in the Prime Minister, assisted by two or three Ministers without portfolio, while the direction of Administration was left to separate heads of Departments connected mechanically by a secretariat, rather than combined organically by discussion and co-operation. In these circumstances, Mr. Chamberlain, as Secretary of State for India, was responsible, however indirectly and innocently, for the Indian Government's conduct of the Mesopotamian campaign, which had been censured on several grounds, and especially on the ground of deficiencies in the medical service, and, when the Government declared its intention of holding a judicial inquiry into the conduct of the persons concerned, Mr. Chamberlain announced his resignation.

Here is a case in apparent conflict with the doctrine of collective responsibility.[1] A campaign mismanaged, lives and treasure wasted, unnecessary suffering inflicted—it cannot be denied that matters of high policy were involved, and administrative questions of the utmost possible importance; yet the Cabinet was not held responsible, but only the Minister most closely concerned. The truth is that the House of Commons cared very little, and the country not at all, whether Mr Chamberlain resigned or not. Both were convinced, rightly or wrongly, that Mr. Lloyd George was the one indispensable statesman, and that no one else mattered. There was no Cabinet, in the ordinary sense. The parcelling of responsibility was not a change in it, but one of the evidences that it had, for a time, ceased to exist. A parliamentary majority which, in ordinary times, allowed a Government to compound for Mesopotamian horrors by dropping one

[1] There was an earlier case in 1864, when Robert Lowe resigned the Vice-Presidency of the Committee of Council on Education because the House of Commons disapproved the Committee's treatment of inspectors' reports. In this case the adverse majority was largely due to Lowe's own inadequacy in the debate If there had been any suggestion that it might endanger the Government, the Liberals who voted for the adverse motion would have voted the other way The Prime Minister (Palmerston) endeavoured to dissuade Lowe from resignation. (I owe this reference to Mr. D. A. Winstanley.)

Minister would not be likely to be a majority for long.

The second notable recent exemplification of individual ministerial responsibility is the resignation of Mr. E. S. Montagu in March 1922. That gentleman also was Secretary of State for India, and, without consulting the Cabinet, he published a message from the Indian Government pressing for revision of the Sèvres Treaty.[1] Mr. Chamberlain (a Minister once more, acting as leader of the House of Commons), in announcing Mr. Montagu's resignation, declared that 'the Government were unable to reconcile the publication of the telegram of the Government of India on the sole responsibility of the Secretary of State with the collective responsibility of the Cabinet, or with the duty which all Governments of the Empire owed to each other in matters of Imperial concern.'

There can be no doubt that this was sound doctrine, though Mr. Montagu was unlucky that, with the gradual return of the normal, he should be the first to be used as a living lesson, a human docu-

[1] The treaty ending the war with Turkey It was never ratified, and was replaced by the Treaty of Lausanne, 1923.

ment, for the re-enforcing of it. The publication of a message from a Dominion Government pressing for a change in Imperial foreign policy was clearly a Cabinet, and not a departmental, question. What are Cabinet questions and what departmental cannot be decided by a general rule to meet all cases, but in most cases the classification should be clear, and this was such a case. There may have been other grounds for desiring Mr. Montagu's resignation, but this—that in a matter proper to collective responsibility he had acted without Cabinet authority—was ground enough.

Before leaving this subject, it may be well to say something of the latest of all resignations, a collective one this time, the resignation of the MacDonald Government. This was an instance very like Lord Morley's [1] 'Chancellor of the Exchequer . . . driven from office by a bad despatch from the Foreign Office.' Mr. MacDonald was indirectly forced to resign—was directly forced to the immediate alternative of resignation or dissolution—by the fact that a majority of the Commons disapproved of the Attorney-General's conduct in the matter of a journalist named Campbell, accused of sedition.

[1] *Walpole*, 155.

How much the Prime Minister or the Cabinet had to do with the case was matter of dispute, and need not be enquired here. They resolved that censure or even inquiry would be intolerable to them as a Government, and, when the majority of the House of Commons insisted on one or the other, they were bound to act as a unit. No doubt Ministers could from the first have decided (if they felt warranted by the facts) that the Attorney had acted indefensibly, and that, since he had consulted no one before acting, no one need share his responsibility. But such decisions, even if there is no doubt about the facts, no Government can afford to make very often.

A clear, thin line cannot be drawn round the sphere of collective responsibility. All Ministers must agree, in deed if not in thought,[1] on all questions of current political controversy, and they must all be equally ready to suffer if the views on which they agree bring them into conflict with the House of Commons. The strictness with which the rule is applied varies. It might now seem harsh and pedantic, for instance, if a leader, not even in office

[1] When differences in thought are wide and apparent, the Ministry is likely to be near disruption or defeat Cf, e g, the fiscal doubts and differences of Mr. Balfour's Ministry in 1905 and 1906.

at the time, were to rebuke a youthful follower, as Peel did Gladstone, for confiding to a private correspondent opinions on a political question differing from those of his chief. Desertion of colleagues may not now be so sure of punishment as it was in 1855, when Lord John Russell, then leader of the House of Commons, resigned rather than face Roebuck's motion for inquiry into the Crimean campaign—a piece of pusillanimity from which his rivalry with Palmerston never recovered. But it is still pretty likely to be punished, which was, perhaps, one of the considerations which held the Socialist Ministry together in the Campbell affair. And it is still pretty clear that politicians in the same Party, above all in the same Government, must say the same things. When, for instance, in February 1924 Mr. Arthur Henderson, then Home Secretary and candidate at a by-election, uttered opinions on foreign policy differing from those of the Government, his conduct was not defended, but only condoned. The Prime Minister said in the House of Commons on February 27th, ' Mr. Henderson was under the impression that, although a Minister of the Crown, he could speak as a private person. . . . Of course, that is wrong. . . . '

He went on to plead for indulgence on the ground that 'there has not been a Government that ever sat on these benches that has not had to face this trouble,' and that 'if ever it was justifiable for any Party leader to put his telescope to his Nelson blind eye, it is when you get a body of men and women such as I have about me.'

Of all the characteristics of the Cabinet, secrecy is the clearest both in origin and in application. Historically the Cabinet is a specially private meeting of the most confidential members of the King's Privy Council, bound by oath to secrecy, and in that fact alone there is reason enough for every kind of secrecy except secrecy against the King: this secrecy as well came in at the very early stage in Cabinet history when the Cabinet began to be not a private device of the King's for managing or eluding Parliament, but a confederacy of party chieftains to appropriate the executive functions of the Crown. And as the Premiership developed from a practical necessity into a regular office, communication between Crown and Cabinet became one of its principal duties: so that the only Cabinet records and the only exception to Cabinet secrecy

were contained in the Prime Minister's notes to his sovereign.[1]

This has been altered, permanently it seems, by the necessities of war. With a Cabinet in almost perpetual session, sometimes in two places at once, composed extremely variously, and often attended by persons in no sense members of it, if it was to have any of the self-consciousness necessary to life, it must be provided with an artificial memory. And so it was endowed with a secretariat to prepare its business and record its decisions. But the obligation of secrecy, though it may not have been always observed scrupulously, still remains. Cabinet secrets are the secrets not only of a Minister, nor even of the Cabinet, but of the King as well, and they should not be revealed without the consent of all parties.

Very little has been said here so far about the Crown, and yet from a legal, and, not less important,

[1] Cf Derby's letter to Beaconsfield, July 14th, 1877, quoted in Monypenny and Buckle's *Life of Disraeli*, vi, 264 *n*. 'The notes which I generally take at Cabinets . have been kept merely for purposes of convenient reference , those of old dates have been from time to time destroyed, and all will be I have always understood it to be an unwritten rule of administrative practice that no permanent record should remain of what passes in Cabinet But to temporary memoranda kept, while they exist, for personal use, I know of no objection.' Cf also the House of Commons Debate, June 13th, 1922, *Hansard*, clv, 213.

from a sentimental point of view, it is the head and centre of the constitution. The Courts are the King's Courts, Parliament merely the highest of them, the judges his substitutes, the laws are his laws, Ministers are his servants, the Army and Navy are his, foreign relations are his relations with other sovereigns, nationality consists in common allegiance to him, honour in distinction by him, orthodoxy in adhesion to the Church of which he is supreme head and governor.

That it is, nevertheless, possible to proceed so far in almost complete neglect of the Crown is due to the transference of the power of practical decision in these matters to a Cabinet strong in the support of a Parliament which is financially and legislatively omnipotent. Yet the wearer of the Crown has still some power, and more influence, and, besides, the Legislature's control of the Executive is not the whole story: it is no less true that the Executive controls the Legislature. Charles I thought, not unreasonably, that it was ridiculous for sovereignty, or even a share in sovereignty, to be claimed by an assembly which he could make and unmake as he chose. The absurd has become normal and regular by the transference of royal powers over Parliament

to parliamentary personages. Who received these powers, and how they may use them, and what powers are left to the King, these are the next questions to be discussed.

Of the making of Parliaments not much need be said, since there is nothing left to discuss. For nearly two and a half centuries now a variety of reasons (of which it suffices to mention control of revenue and expenditure) have necessitated at least annual sessions of Parliament, and have tended to make sessions longer and longer. During the same period the maximum life of each individual Parliament, the maximum interval between general elections, has been determined by statute. At present the maximum is five years.

Of the power of unmaking Parliaments, of dissolving them before they have reached their allotted span, there is a good deal that is not so fixed as to be beyond discussion.

At first Parliament assembled to do the King's business, and dispersed when the King had had enough of it. If, even during the same year, there were more Parliamentary business to be done, another, different, Parliament was called. In the sixteenth century the habit began of proroguing

the same Parliament from session to session. Then the Stuarts found it convenient to be able to keep a Parliament that was amenable or to destroy one that was recalcitrant. After the Revolution, Parliaments which in any case could not live for longer than three years were hardly worth destroying: the prerogative was very seldom exercised, and then independently by the Crown. When Parliaments became septennial the same party continued in power for a long generation, and both then and afterwards Governments found other methods of securing Parliamentary support more attractive than appeals to the electorate. The general election of 1784 was, as has been seen, the first occasion on which a Prime Minister appealed from the House of Commons to its constituency.

In the nineteenth century old methods of securing a majority in the House of Commons were no longer efficacious, nor was the mere possession of such a majority any longer nearly so close an approach to the control of all political forces. Dissolution began to be a matter of importance, and when that happened the manipulation of it began to be transferred from the King to his Ministers.

In 1831 the Whig Reform Bill was defeated by a

hostile amendment in Committee of the House of Commons. Lord Grey, the Prime Minister, regarded the enactment of this measure as the very reason for the existence of his Ministry, and had obtained the previous consent of the King to its introduction as a Cabinet measure. In these circumstances the refusal of a dissolution would have been tantamount to dismissal. The King, therefore, consented to dissolution, and the Bill became law, after further adventures to which later reference will be made.

This was an instance of a Premier being allowed to avail himself of the royal prerogative of dissolving Parliament as a weapon in political controversy, but it by no means decided that any Premier might always make use of it as a matter of course. In 1839 Lord Melbourne,[1] the retiring Prime Minister, after advising Queen Victoria to be firm in dealing with Peel's request for the dismissal of her Whig Ladies of the Bedchamber, goes on to suggest about dissolution that 'if this should be again pressed' she had better reserve her opinion, 'not to give a promise that you will dissolve, nor to say positively that you will not.' As Sir William

[1] For this and later instances, cf. *Queen Victoria's Letters.*

Anson[1] has pointed out, the Queen received from Melbourne 'an impression that a dissolution of Parliament did not mean so much an appeal by Ministers to the country for approval of their policy, as an appeal by the Queen to the country on behalf of her Ministers.' In 1846 she told Lord John Russell that it was 'a most valuable and powerful instrument in the hands of the Crown, but which ought not to be used except in extreme cases and with a certainty of success. To use this instrument and be defeated is a thing most lowering to the Crown . . .' and she went on to express her entire concurrence with the opinion expressed by Sir Robert Peel in the House of Commons, that 'no Administration is justified in advising the exercise of that prerogative, unless there be a fair, reasonable presumption, even a strong moral conviction, that after a Dissolution they will be able to administer the affairs of this country.'

After twenty years' experience of the throne, she still thought that this was a prerogative whose exercise required at least the active authorisation of the monarch. She wrote in March 1857 to

[1] W. R. Anson, *Law and Custom of the Constitution*, 5th edition, i, 326.

Palmerston that she 'could not possibly come to a decision on so important a point without a personal discussion'; and the next year the Queen refused Derby's request for permission 'to announce that, in the event of an adverse majority, he had Her Majesty's sanction to a dissolution.'

This occasion was a turning-point: for the Queen, apparently not quite certain of the propriety of her action, sought the support of Lord Aberdeen, as that of a man widely experienced in politics and now retired from them. Aberdeen approved the refusal to permit the threat of a dissolution, but at the same time suggested that if her Minister advised her to dissolve it would be constitutional to assent. Moreover, he considered that Ministers had a right to threaten dissolution so long as the Queen's name were no part of the threat; she, no doubt, had a right to refuse, but then she must find a Prime Minister who must accept responsibility for the refusal, and 'he could not remember a single case in which the undoubted power of the sovereign had been exercised upon this point.'

Since that occasion it has hardly been doubtful

that the monarch would dissolve, of course, on the advice of a Prime Minister.[1]

Closely connected with the royal prerogative of altering the character of the House of Commons by dissolving Parliament is its prerogative of altering the character of the House of Lords by creating peers. This prerogative has been exercised in a wholesale way, and as an expedient for influencing the decisions of the Upper House, only once, in 1713, to make possible the legislation necessary to the peace of Utrecht. But the mere threat of it has been effective on two more recent, and, for present purposes more important, occasions.

When William IV allowed Lord Grey to use the prerogative of dissolution in the interests of the Reform Bill, he was not equally complacent about peer-making. When the Reform Bill (the third within a year) was in course of amendment beyond recognition by the Lords, the Prime Minister wanted to know whether the Utrecht expedient

[1] But remember the incident in December 1923, when Mr. Asquith e.g., doubted whether His Majesty was bound to dissolve on the advice of a Prime Minister who had always been in a minority, never even leading the largest party in the House. It seems, indeed, that His Majesty might have refused, on condition of finding a new Prime Minister ready to be responsible for the refusal But the fact that he did not makes it much less likely that he or any other monarch would do so on a future occasion. See also p 94.

was at his disposal. The King wouldn't, and he would, and finally he wouldn't. Lord Grey resigned. The Duke of Wellington failed to form a Ministry that could carry on the King's government. Lord Grey came back, and this time William had no alternative but to give him the promise he required, though he managed to avoid carrying it out by inducing the Peers to withdraw their opposition.

In this case the prerogative of creation had been put at the disposal of Ministers by the King's personal decision, and only when it had become clear that the public could not be satisfied nor the Government peacefully carried on by any other method. On a later occasion, to enable the Liberal Government to carry the Parliament Act, it was much more freely used. It will be convenient in this connection to explain what were the matters in dispute.

From the fifteenth century it had been settled that money grants must originate in the Commons; from the seventeenth it had been claimed, and not effectively denied, that they could not be amended by the Lords; in the nineteenth (more exactly in 1861) the Lords were cut off from rejecting one money grant without rejecting all, for all

were included in a single Finance Bill, not subject to amendment. It was generally assumed that finance had thus been entirely removed from the competence of the Upper House; but in 1909 the Liberal Government's Budget was rejected by the Lords.

This was, in effect, a claim to a right of dissolution, for clearly some sort of a Finance Bill had to be got on to the statute book, and it was certain that no Cabinet would be willing to govern on condition of making financial arrangements agreeable to the Lords. Accordingly, Parliament was dissolved, and, after the General Election, the Liberal Government (although it lost nearly a hundred seats, and its Unionist opponents gained rather more) was still able to secure a working majority with Labour and Irish assistance.

To deprive the Upper House of the power of reference to the electorate, which it had just exercised, the Parliament Bill was then introduced, of which the object (and eventually the effect) was to disable the Lords from rejecting money bills, and to restrict their powers with regard to other bills so that they should become law, in spite of the Lords, on passing the Commons in three

successive sessions. It was in announcing the method by which he intended to make sure of enacting this measure that Mr. Asquith marked another epoch in the transfer of the prerogative from the Crown to its Ministers. 'If we do not find ourselves in a position,' he said, 'to see that statutory effect shall be given to that policy in this Parliament, we shall then either resign our offices or recommend the dissolution of Parliament. Let me add this, that in no case will we recommend a dissolution except under such conditions as will secure that in the new Parliament the judgment of the people as expressed at the elections will be carried into law.'

This meant not only that the Prime Minister had a high degree of certainty that if he asked for a dissolution he would get it, but also that he would not ask for one unless he were assured besides that the King would be willing to create as many peerages as he might want.

As to dissolution, at any rate it may be said now (1924) that it is extremely difficult to imagine any circumstances in which it would not be placed at the disposal of Ministers. For we have seen a Premier who had been in office less than a year,

not leading a majority, nor even the largest single party (not because he was refused legislation essential to his policy, but because inquiry was demanded into the relations of his Government with the administration of justice), quite unreservedly threaten with dissolution a House of Commons less than a year old, and carry his threat into effect. There may be doubt as to whether in these circumstances the monarch would have been wise to withhold the prerogative; I do not think there can be any doubt that such action would have been constitutional. It is conceivable even after this that there may yet come a time when a King will refuse to a Premier the use of the prerogative: it was very unlikely before, and it is a great deal less likely now.[1]

There is one more part of this subject on which something should be said here: if the prerogative has been in this manner and sense removed from the Crown, to whom has it been transferred? Is it to the Prime Minister or to the Cabinet?

This is more a personal and political than a constitutional question. How much the Chief

[1] It should be remembered that dissolution inflicts on any M.P. who wants to be re-elected what amounts to a considerable fine, as well as the risk of failure.

Minister dominates his colleagues varies from Government to Government. If too little, then he is a bad Prime Minister; if too much, then it is a bad Cabinet; if absolutely, then (as during the war) there is not in any very useful sense a Cabinet at all. But recently it has been more than once suggested that dissolution is peculiarly the personal privilege of the Prime Minister (as, for instance, appointment to Cabinet office most certainly is). This is a new claim, and there seems no warrant for it. It certainly was not the view of Mr. Gladstone, or of his colleagues.[1] It may be hoped that it will not become the orthodox view, for dissolution is the great weapon of the Government over the House of Commons, and, if it is to be completely and exclusively at the disposal of one man, then a long step will have been taken towards the transfer of the control of British policy and administration from a homogeneous committee, acting as a unit, to an autocrat, unrestricted except by the prospect of dismissal.

[1] Cf. J G Swift MacNeill, 'The Prime Minister and the Prerogative of Dissolution,' in the *Fortnightly Review* for May 1922.

CHAPTER VI

CROWN AND EMPIRE

Now that some indication has been given of the extent to which the prerogatives of the Crown have been transferred to the Ministry, and of the manner in which they are exercised by it, it is time to speak of the possibilities of action which are still left to the actual wearer of the Crown. These may be summed up in Mr. Gladstone's words[1]: 'As against the Ministers, the sovereign's prerogatives' are 'firstly, that of appointing and dismissing them; secondly, that of exercising an influence over their deliberations:' with the addition (not 'against,' but also not altogether controlled by, British Ministers) of the unique and unmeasured efficacy of the Crown in Imperial Government.

The prerogative of dismissing Ministers may be very briefly treated. Its exercise has long been rare, and has quite ceased to be a calculable part of politics. It is just possible that this power will

[1] W. E. Gladstone, *Gleanings of Past Years*, I. 78.

again be exercised, and it is useful that it should be so kept in reserve, but such exercise can be attempted only on condition of finding a premier to take the responsibility of it, and can be effective only in the event of his obtaining a parliamentary majority to support his enterprise.

Normally, appointment also is not more than nominally in the discretion of the Crown, for normally the situation of Party politics makes it clear that one man, and no other, is capable of forming an administration to carry on the King's government. But occasions may arise when it is not certain which party is most likely to be supported by Parliament, or where it is apparent enough which party is to be preferred, but doubtful who is the man most competent to lead that party. In such cases the King has an unchallenged right to make his own selection unhampered, but not, if he choose, unhelped, by advice. All the relevant precedents are Victorian, and they all illustrate the monarch's freedom. In 1852 Lord Derby, the retiring Premier, was snubbed for offering his assistance in the choice of a successor. Seven years later, when he was retiring again, the Queen, embarrassed by the equal claims of Palmerston and Russell, asked no one's

advice, but of her own motion sent for Granville: Granville proved inadequate to the task, and in the end it was Palmerston who became Prime Minister. In 1868 Derby, resigning for medical reasons, although still in a majority, ventured to suggest the name of Disraeli, but Disraeli's appointment was a foregone conclusion. In 1876 Disraeli, in explaining to his colleagues the reasons which had led him to contemplate at first resignation and then promotion to a peerage, wrote: 'Being well acquainted with the Queen's sensitiveness, or perhaps I ought to say constitutional convictions, on the subject, I did not presume to recommend my successor.' In 1880 the Queen again had a choice before her, Mr. Gladstone having announced his withdrawal from official life, and no other politician being unmistakably the destined leader of a Liberal Ministry. As between Hartington and Granville, she chose Hartington, but he (like Granville earlier) failed to form a Ministry, and it was Gladstone who became head of the Government after all. Lastly, in 1894 Gladstone at first thought that his advice would not be asked, and then that it would (in which case he resolved to recommend Lord Spencer): in the event the

Queen chose for herself, and sent for Lord Rosebery.

On all the Victorian precedents, then, the Crown's right to choose, when there is any possibility of choice, is undeniable; but it is not unqualified or arbitrary; it must conform to the facts, and if it does not the facts will make it. Royal preference fails to make a premier of a Granville or a Hartington, but it succeeds (for a time) with a Rosebery. As to more modern instances little can be said, and nothing certain. It has been stated, but is not known, that after the general election of December 1923 (which returned 259 Unionists, 192 Socialists, and 158 Liberals), and the resignation of the Unionist Government, it was on the advice of the retiring Premier that the King sent for the Socialist leader. In any case it was hardly a matter of choice, and whatever happened can hardly be taken to limit the monarch's right of choosing in the future, but at most to illustrate a prevalent tendency.[1]

The other prerogative, 'as against the Ministers' (in the Gladstonian classification), is 'that of

[1] When, in December 1916, Mr Bonar Law declined to attempt the formation of a Government, His Majesty asked his advice about the next step to be taken, and he then advised that Mr. Lloyd George should be sent for Stated by the late Lord Long in a speech at Trowbridge, December 3rd, 1923. (*The Times*, December 4th, 1923.)

exercising an influence over their deliberations.' What the effective validity of this prerogative may be at any given time no man can know, unless perhaps the Prime Minister of the moment, and he cannot tell. Yet something may be said to show what it rests on, and what it consists of.

The foundation is the orthodox theory of the constitution—that the Government is the King's Government, the Ministers merely his advisers. Responsibility for every political act is theirs, and therefore the right of decision, but, ' though decisions must ultimately conform to the sense of those who are to be responsible for them, yet their business is to inform and persuade the sovereign, not to overrule him.'[1] Indeed, the reason why the royal veto on legislation has, for over two centuries, been in abeyance, is in a very real sense not because the Crown has been too weak, but because it has been too strong.[2] When the King's Ministers are always in a majority in the House of Commons it would be absurd for the King to veto a Bill whose existence depends on the will of that House, since clearly

[1] Gladstone, *Gleanings*, 1 232.

[2] Not, of course, the person who wears the Crown, but the Crown as the centre of government, on condition of being based on parliamentary support.

any project of legislation (or for that matter of policy) must be submitted to the monarch before it is announced to the world.

Such is the historical justification of the royal influence on policy, but what makes it real is something different. If that were all, submission of Government projects to the monarch might have become the merest formality, initiation by the monarch the flattest impossibility: and that, in the last instances in which we can gain glimpses of these innermost secrets of Government, is not the case.

For this continued reality of the Crown's participation in Government various reasons may be adduced, and have been so often that here they need not be more than indicated—its wearer's social and ceremonial superiority, his permanent presence at the centre not only of British, but of world, politics, his immunity from personal and party motives, his personal relations with other rulers, the fact that he represents not a party but a people, and not only the people of the British Isles but the people of the British Empire.

Some of the Victorian precedents are unlikely to be followed. It is not likely that a party will again

be kept out of office for two years by the exigencies of the royal household, as happened in the famous Bedchamber Crisis of 1839. The disappearances of dynasties have much reduced the opportunities for the utilisation of the personal relations of royalty, as, for example, in the instance of the Spanish marriages : but this does not mean the end of royal importance in foreign affairs. If the prolonged wrangles between Victoria and Palmerston are not very likely to be repeated, it is as much because our Foreign Secretaries tend to differ from Palmerston as because our monarchs tend to differ from Victoria. But royal insistence may still be necessary, and would still be proper, to make sure that great decisions of foreign policy were the work of the Cabinet, and not merely of one or two members of it—a purpose for which it was more than once, if not always with complete success, employed by Victoria (e.g. in 1853 and 1882)—and royal advice may still modify a Foreign Secretary's despatches, as when in 1861 it softened the tone of one which might probably have led to the breach of relations with the United States. This does not mean that the Crown could take any action not approved by the Cabinet, nor that, in foreign any more

domestic politics, there could be anything done for which the Cabinet was not responsible. Nor is it possible to guess how great has been in practice royal influence on foreign policy during the last quarter of a century ; but it will hardly be doubted that, in Edward VII's time, for instance, it was considerable, legitimate, and beneficial.

Nor is it only in the sphere of foreign politics that royal influence has been considerable in recent, and may be considerable in future, generations. Victoria would not have Cobden at the Poor Law Board in 1847 because ' the elevation to the Cabinet directly from Covent Garden (i.e. from the public platform) strikes her as a very sudden step ' ; in 1859 she would not have Bright in the Privy Council because in her judgment it was ' impossible to allege any services Mr. Bright had rendered to the State.' These are, perhaps, no longer ruling precedents, and this sort of absolute blackballing may be surmised to be obsolete, and yet it may be that appointments are not always unaffected by the royal preferences. Even in legislation the royal right to a knowledge of ministerial counsels may affect events, as it certainly did, for instance, in connection with the Reform Act of 1867, or the

Irish Church Act of 1869. And the royal impartiality may intervene for national objects in the party conflict, as it did in 1884 to bring Gladstone and Salisbury into a conference which resulted in the agreed passage of the Reform and Redistribution Bills, or again in 1914 (not without protest from Liberal newspapers and Socialist orators) to bring together the conference of Government, Opposition, Nationalists, and Ulstermen which unfortunately failed to solve the problem of Ulster's relation to Ireland under Home Rule. In administration it is not inconceivable that the Crown may yet be able to promote ministerial efficiency and energy, as it certainly did at the time of the Crimean War and of the Indian Mutiny. Where the business of administration shades into the decision of policy, at least in everything affecting foreign policy, one of the chief difficulties of contemporary British government is the necessity of remembering other parts of the Empire besides the metropolis, and it may be that in the immediate future the keeping of this necessity in the minds of British Ministers may become the essential political function of the Crown.

In reading all this it must be remembered that the personal action of the Crown is limited to advice

and suggestion imparted directly by the monarch to his Ministers. Anything overt, whether by word or deed, must be sanctioned by the responsibility of a Minister. It is a mistake, however, to suppose that the monarch is himself bound to listen to no one but his Ministers: he is bound, indeed, to let their advice be in the end decisive with him, but, up to the point where they take their stand immovably, he may listen to the private, and not obligatory, advice of whomsoever he chooses.

It is not only as the one not narrowly British personage at the centre of British government that the wearer of the Crown has an imperial importance; it is also as the one organ of the constitution to which every section of the Empire can own itself subordinate without any sense of humiliation or resentment. This may be illustrated (and with it something of the essence of the Empire in general) by a short indication of the main principles which have historically been applied to the government of the King's overseas Dominions, although there is no room here for even the most cursory sketch of the whole field of imperial government.

There is an important distinction to be made between colonies acquired by settlement and those

acquired by cession or conquest. To the former, subjects of the English King (even in the cases where most of them were Scotsmen) carried with them the law of England so far as it was applicable ; for them the Crown could not make laws by Order in Council nor in them could it institute a legislature not comprising an elective body with powers of taxation, nor, having once created such a legislature, could it of its own mere motion alter the constitution of the colony. On the other hand, in colonies ceded to the British Crown the Crown's prerogative sufficed absolutely to alter the law in any way, and if it was not so used then, it was assumed that the law in force at the time of cession remained valid : except that, in territories however acquired, the mere fact of the lordship of the British Crown established the English common law view of the political rights of the Crown.

So much for the prerogative of the Crown : what were the rights of the Crown in Parliament was another matter. ' A house of burgesses broke out,' as a contemporary said, in Virginia in 1620, another in Massachusetts in 1634. What were to be the relations of these and similar assemblies to the British Legislature ? As has been shown above,

the American War of Independence effectively affirmed the doctrine of parliamentary sovereignty over all the King's Dominions, at the cost of the surrender of the American colonies from those Dominions. It has been very often assumed that the War of Independence, at the same time as it enforced the doctrine of parliamentary sovereignty, also taught the lesson of its danger, so that there began at once a growing practice, which in a century or so became obligatory without exception, of exercising it only in accordance with local opinion, especially as expressed by local assemblies. This conception contains no truth. The lessons which British politicians at the time believed that they had learnt were two—that any attempt to make the colonies share the burden of imperial defence being so fraught with danger, the Crown must in future rely upon metropolitan resources for that purpose, and that concessions towards self-government were very likely to induce demands for independence.

The first of these doctrines has contributed enormously to the burdening of the home population, which is now the gravest danger to the Empire. The second was abandoned in 1840. Three years earlier rebellion had broken out in Canada. Some

change had to be made, and Lord Durham was commissioned to discover what. The essence of his report was that the colonial governor should be 'instructed to secure the co-operation of the Assembly in his policy by entrusting its administration to such men as could command a majority.' A beginning was made in the utilisation of this expedient with the Secretary of State's instructions to Lord Durham's successor[1]: 'That hereafter the tenure of Colonial Offices, held during Her Majesty's pleasure, will not be regarded as equivalent to a tenure during good behaviour.'

The Act of Parliament which had set up the Canadian Constitution of 1791 had embodied an honest intention to endow Canada with the same sort of government as England enjoyed. Now, in 1838, it was seen that the first prerequisite to such a result was responsible government; and it is to be noticed that the first step towards that arrangement was an exercise of the prerogative, the issue of instructions from Her Majesty's Secretary of State to Her Majesty's Governor-General.

Other steps followed rapidly, and almost continuously. Lord Durham had thought that the

[1] Quoted by H. E. Egerton, *British Colonial Policy*, p. 305.

constitution, foreign relations, external trade, and public lands, ought all to be 'imperial' matters, reserved for the control of the Home Government. By 1870, as a result not of legislation but of the policy of the servants of the Crown, the only one left was foreign policy. Here it was clearly impossible, if anything at all was to be preserved of the Empire's unity, for each colony simply to be left to make its own decisions (as, for instance, in the matter of public lands) within the area of its own natural competence. Yet something had to be done to give the Dominions some share in foreign policy, and, again, it is the position and functions of the Crown that have characterised the course of development.

The solution (partial, no doubt, so far, and perhaps destined never to be complete) is that of conference between London and the Dominion Governments, coming to decisions which will be effective in so far as they are accepted by majorities in the separate Parliaments. At first these meetings of the Crown's Ministers for different territories grew out of their simultaneous presence in London for great ceremonial occasions of which the Crown was the centre —the Jubilee, the Diamond Jubilee, King Edward's

Coronation. The year 1907 marked a change in this respect, as also in the use of the title *Imperial* Conference, and in the decision to meet for the future every four years.

With some developments (especially the Conference's decision in 1911 that Dominion representatives should be invited to the Committee of Imperial Defence, when it was discussing matters which particularly interested them), this tentative organisation did much to secure the unity of the Empire as a factor in international politics, and something to bring colonial resources to its reinforcement. When the war came, with Dominion participation in it almost as full as that of the home country, every one saw, and every one that mattered said, in Mr. Bonar Law's words : ' It is not a possible arrangement that one set of men should contribute the lives and treasure of their people, and should have no voice in the way in which those lives and that treasure are expended.'[1]

The alternative which was adopted was to put the highest direction of policy into the hands of an Imperial War Cabinet, which consisted of the

[1] Quoted by H. D. Hall, *The British Commonwealth of Nations*, p. 162.

British War Cabinet, afforced with one Minister from each of the great Dominions, and which virtually continued its existence as the British Empire Delegation at the Peace Conference.

The only formal changes that have survived from the period of war are the Cabinet secretariat, and records, and the resolutions that Dominion Premiers shall be kept regularly informed of developments in foreign policy, and shall have the right of communicating directly with the British Premier, instead of through the Colonial Secretary.

Nevertheless, war developments have had lasting effects of the greatest constitutional importance. Decisions to provide for 'constant consultation in all important matters of imperial concern,' to arrange for the continual representation of Dominions by Ministers resident in London, to hold, as soon as possible after the war, a conference to revise the constitutional organisation of the Empire—all these proved ineffective. But yet steps were taken which went far to make Dominion Ministers responsible to their Parliaments for foreign as for every other kind of policy. The treaties of peace owe their effectiveness in the Dominions to local legislation (whereas no longer ago than in 1911, for instance,

the Geneva Conventions Act[1] of the Imperial Parliament had altered the law for the whole Empire to meet international obligations recently undertaken); they were signed by representatives of the different parts of the Empire acting under local authority; they were ratified (as were also such of the Washington Agreements as have been ratified) with the concurrence of the Dominion Governments and the approval of their Parliaments.

All this does not mean that Canada and Australia have become separate units for international purposes, as England and Hanover were in the eighteenth century. The British Empire preserves its diplomatic unity.[2] Indeed, it is just because of the unity maintained in the Crown that this development of local autonomy has been possible. In international law the High Contracting Power is still His Britannic Majesty's Government. That that Government will not contract except on the

[1] Quoted by A. B. Keith, in *The Constitution, Administration and Laws of the Empire*, p. 18.

[2] For the relations of the League of Nations to this statement, cf. A. B. Keith, op cit, 48 seq., and H. D Hall, op cit, 340 seq. See also Sir Geoffrey Butler's *Handbook to the League of Nations* (new edition), A. D. McNair, 'The Emancipation of the Dominions,' in *The Nation and Athenæum*, October 6th, 1923, and Lewis, 'International Status of the British Dominions,' in the *British Year Book of International Law*, 1922–23.

advice of British Ministers, that, in matters affecting a Dominion, British Ministers will advise the Crown only in unanimity with the Ministers of that Dominion, these are established and important rules of the constitution, but they affect neither the diplomatic status of the British Crown nor its legal authority to make or ratify any treaty whatsoever.

Another branch of the Crown's power in imperial Government is the control by way of veto of Dominion legislation. Reluctance to use this power has been so strikingly exhibited, that it is now almost safe to assert that the Royal Assent will not in future be withheld, except from measures infringing treaty rights or exceeding the competence of the enacting body.

One more imperial function of the Crown remains to be noted, the most ancient of all. To be the fountain of justice is of the essence of the English kingship, and the subjects of the English King have looked to him for justice even when they resided far from England. In this regard the King acted on the advice of his Privy Council, and the right of appeal from any colonial court to the Privy Council subsisted by prescription till in 1844 it was regulated and validated by statute. Apart

from any other consideration, it is clear that in States with legislatures subordinate to an outside legislature (as in States like America, with legislatures subordinate to a federal assembly and to a rigid constitution) the right of appeal to a court in every way independent is, at the lowest, extremely convenient: so it is that, in spite of natural jealousies, which might well have been fatal to a tribunal formally and historically parliamentary instead of royal, the right subsists, some little circumscribed in law and rather more in practice, but for its main purposes intact.

After so much insistence on the imperial importance of the Crown, it may be useful to offer a reminder that in the British Empire, as in the United Kingdom, the sovereignty of the British Parliament is fundamental. It is true (and has been already partly shown here) that that sovereignty will not be exercised to affect any self-governing Dominion without the agreement of the Dominion concerned—except where the self-government so granted is clearly being used to 'interfere with loyalty of the Dominion to the Empire'[1]—nor

[1] Dicey, *Law of Constitution*, 1915, p xxxii, cf also Keith, *Responsible Government in the Dominions*.

even for Crown colonies and protectorates is imperial legislation passed without extreme care and candid consultation of local authorities. The very constitutions of the Dominions rest in all cases (except that of Newfoundland) on Acts of the British Parliament. Good examples of the propriety and convenience of imperial legislation in matters affecting the whole Empire are the British Nationality and Status of Aliens Acts, 1914, 1918, and 1922.[1]

A striking instance of such legislation applied to a particular Dominion is the British North America (Amendment) Act, 1916, which was necessary to enable the Canadian Parliament to prolong its life to meet war exigencies, the more striking by comparison with the ability of the sovereign British Parliament to perform the same office for itself.

[1] Quoted by Keith, *The Constitution, Administration and Laws of the Empire*, p. 17

CHAPTER VII

SOVEREIGNTY AND THE RULE OF LAW

Of the main features of English government (for so it may still be properly called though it has been developed to rule an empire) three have now been described, or at least indicated, and something has been said of the historical process which has brought them to their present shapes and positions. These are the three : the Crown as the symbol and fountain-head of power, the Parliament as the controller and dispenser of it, the Cabinet as its director, responsible to the other two, and, through them, to the people whose representatives they are.

This second, indirect, responsibility has had some reality ever since there began to be a Cabinet, for already then the throne was founded upon national consent, and, in the partnership of King and Parliament the House of Commons had already a predominance which was effective, and which was to prove permanent and increasing. In the last century continual efforts have been made to extend

and intensify that reality by popularising the constituency which elects the House of Commons. How successful such efforts have been is rather a political or metaphysical than a constitutional question. At any rate, so far as constitutional arrangements go, they are now very nearly as complete as can be.

Even if in practice they are as complete as they are in constitutional theory, there still remains to be discussed not less than half the subject of the relations between the individual and the constitution. And the half that is left is the half that most matters to most men most of the time, because to the ordinary citizen what he can do to the Government is much less important than what the Government can do to him, and especially than what he can be sure it will not do. The two chief features of English political institutions since the Norman conquest, says Dicey,[1] are, in the first place, 'the omnipotence or undisputed supremacy throughout the whole country of the central Government,' and, in the second, 'the rule or supremacy of law.' Something has been shown of the meanings and workings of the first; what is meant by the

[1] *The Law of the Constitution*, pp. 179, 183, 191, 198.

second must next be enquired: how it limits the action of the State, and how it works for the freedom of the individual. In this enquiry it would be presumptuous to hope to add anything to what has been explained by Dicey in his *Introduction to the Study of the Law of the Constitution*; here no more will be attempted than the shortest exposition of the parts of his treatment most necessary to be known.[1]

The rule of law means 'That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts . . . that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals': and, thirdly, 'That the general principles of the constitution (as, for example, the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.' Or it may be put in slightly different terms: 'The

[1] This does not mean that Prof Dicey is responsible for any of what follows, except where it is quoted from his works.

absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power . . . equality before the law . . . the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals.'[1]

These are not, in origin, liberties granted to Englishmen in any document or by any sovereign, but principles inherent in the common law of England, the subjects of enactment only in so far as statute, the legal expression of the will of the whole nation, may be invoked to guarantee or apply them or, exceptionally, to limit or suspend them. Magna Charta, the Petition of Right, the abolition of Star Chamber, the Habeas Corpus Act, the Bill of Rights—these, indeed, are great events in the history of the rule of law, yet not as making it, but as declaring it, and as removing obstacles to its efficacy. All through the Middle Ages the struggle with the King was, so far as it was not merely part of a series of private wars between barons and faction leaders, a struggle to make the King keep the law. There might be doubt as to

[1] *The Law of the Constitution*, pp. 179, 183, 191, 198.

what was the law and how it was to be enforced, but not (in the later Middle Ages at least) that the law was the law of all, rulers and subjects alike.

At the very end of the Middle Ages, however, in the fifteenth century, it became clear that the most urgent question about the law was the question of how to get it enforced, and much more against great subjects than against the King. This and other causes produced in the sixteenth century a great development of jurisdiction, conciliar jurisdiction, of which the Star Chamber was the most prominent organ, and which did much to break the rule of law as defined above. This it did in more ways than one; a jurisdiction outside the ordinary law was able to punish private citizens who had not committed any breach of known law, and to protect from punishment servants of the Crown who had exceeded the law; and generally, it could, and did, use the power of the State to punish its individual subjects in pursuance not of the national law, but of the Government's policy. 'It is convenient that we mayntaine and hould as good agrement and correspondence as wee may betwixt our proceedinges in matters of State and

the practize of the Lawe.'[1] That was the general principle of conciliar jurisdiction—respect for the law, but a higher allegiance to reasons of State; and it is quite incompatible with the rule of law. It was, therefore, a great step towards the establishment of that rule when, in 1641, the arbitrary jurisdiction of the council was abolished—a step, indeed, which may be said to have destroyed the Crown's claim to override positively the administration of the law. A power of negative revision still subsists in the Crown's right of pardon, now always exercised on ministerial advice. In Charles II's time this power was, or at least was assumed to be, much wider, extending to *dispensation*, that is, to guaranteeing individuals immunity from penalty for breach of specified laws; to *suspension*, that is, suspending the operation of particular enactments; and to *anticipatory pardons*, that is, granting pardons in bar of prosecutions, and not merely to remit the penal consequences of them. Anticipatory pardon was last attempted in Danby's case (1678). Suspension and dispensation were excessively used by James II, and were provided against by the Bill of Rights. James also, with his imitation High

[1] Quoted by W. S. Holdsworth, *History of English Law*, iv. 87 *n*.

Commission Court, made the last royal attempt to revive prerogative jurisdiction for the overruling of the ordinary law, and that, too, was one of the causes of the 'Glorious Revolution,' and one of the abuses which the Bill of Rights denounced.

Before proceeding with the consideration of the rule of law in itself, it will be convenient to refer to its connection with the other great constitutional principle, that of parliamentary sovereignty.[1] There is, first, the fact that the commands of Parliament—King, Lords, and Commons—are altered only by formal and deliberate legislation, by Act of Parliament, and that otherwise no legal cognisance will be taken of them. This contributes greatly to the authority of the judges and to the fixity of the law, and Parliament has not attempted to depart from it, though (as will be seen) one House has, and though Parliament has recently authorised an occasional departure from it in emergency. Then Government officials are not appointed by, nor directly subordinate to, Parliament, so that Parliament has been naturally disinclined to exempt them from the liabilities of ordinary citizens: and, though Parliament is the supreme legislature, yet

[1] Ref. Dicey, op. cit., p. 402 seq.

its will, once uttered, is subject to the interpretation of the judges, whose independence is secured by means to be noted later. And, lastly, the supremacy of the law favours the exercise of parliamentary sovereignty, for the rigidity of the law is bound from time to time to hamper intolerably the action of the Executive, and then parliamentary legislation is the only way round, as in our time we have seen, for instance, in the Defence of the Realm Acts and in the Act of Indemnity which followed the Art O'Brien case. It is not, perhaps, out of place here to note also the prerogative-destroying effect of parliamentary sovereignty. Not only can Act of Parliament extinguish prerogative, but also, where it lays down how certain Acts are to be done, those Acts are thereby withdrawn from the prerogative. As, for instance, in the case of *Attorney-General v. de Keyser's Hotel* (1920), it was held that a statute of 1842 having authorised the occupation of property for the defence of the realm, the Crown had lost its common law prerogative of unconditional commandeering in such circumstances; and *In re Ferdinand, ex-Tzar of Bulgaria*,[1] it was held that the Crown's common law right to seize and forfeit

[1] 1921, 1 Ch. 107. This reference I owe to Mr. A. D. McNair.

private enemy property found in the realm was superseded, at least temporarily, by the Trading with the Enemy Acts.

The 'Glorious Revolution' marks, then, the end of royal invasions of the rule of law in this sense of 'the absolute predominance or supremacy of regular law': but even in that sense it has not been intact and unthreatened ever since. The House of Commons had taken the place of the Crown as the strongest power in the State, and privilege was in the menacing position from which prerogative had been ejected

Here are some instances of this later menace. In 1701[1] the freeholders of Kent petitioned the House of Commons to grant supplies to enable William to go to war with France. The House resolved that this action was scandalous and seditious, and imprisoned five petitioners for the rest of the session. Here were subjects punished by an arbitrary jurisdiction for the exercise of common law rights recently fortified by statute; the worst days of the Star Chamber were outdone.

Three years later the Commons again arrogated a

[1] The Long Parliament had thrown into the Tower an earlier body of Kentish petitioners, among whom was Lovelace, who then wrote his *Lines to Althea from Prison.*

power of interfering with common law rights, in this case attacking not the person but the property of the subject. One Ashby sued White, returning officer for Aylesbury, for having refused to accept his vote, and fought the case all the way up to the House of Lords, where he was successful. The Commons resolved that in them alone was the right to judge of elections, that they could not exercise it without the right to judge who were electors, that if authority to exercise the franchise could be sought in other courts there would be confusion of judgment and derogation from the rights of their House, and that such suits were, therefore, in breach of privilege. Of these propositions, the first was indisputably true (though it has not always been so, and is not now, the right having been transferred in 1868 to the judges) ; the rest were not true, and set up a claim by one branch of the legislature to deprive subjects of what amounted to freeholds at common law. The Commons, nevertheless, persisted so far as to commit for contempt of their privilege five fellow-townsmen of Ashby's who had followed his example, until they were released by the prorogation of Parliament. But, on the whole, the incident was a victory for the rule of law, for, on their

release, the Aylesbury men obtained from the ordinary courts verdicts which were executed against the returning officers. The Commons never again claimed to adjudicate on the right to vote (though in Wilkes's case they denied the right to be elected, and in Bradlaugh's to sit), and in the course of the controversy the two Houses agreed in the important admission that each of them could only declare what its privileges were, not create new privilege.

This matter of membership of the House of Commons was the occasion of another great clash between Parliamentary privilege and the liberties of the subject in connection with John Wilkes's election for Middlesex. But the governing case for the relation between the House of Commons and the ordinary law is that of *Stockdale v. Hansard*: it is, therefore, necessary to understand what was the essence of that case.

Hansard was sued (in 1836) by Stockdale on the ground that matter published by him under orders from the House of Commons was defamatory of the plaintiff. He pleaded in defence that the House's orders protected him from any action in the ordinary courts, and the House supported his

plea by resolving 'that no court of justice could deal with any question of Parliamentary privilege, that the declaration by the House of any privilege was binding upon all courts, that it was a privilege of the House to order the publication of papers without involving those concerned in the publication in any liability.'[1] The Court of Queen's Bench decided against the plea of privilege, and adjudged damages and costs to Stockdale[2]: the House of Commons committed him for contempt, and the sheriffs also when they tried to enforce the Court's decision.

Observe what is the major point at issue. It is not denied that the House is the proper judge of its own privilege, and it is clearly convenient that publishers of Parliamentary proceedings should be immune from suit; but the House is claiming that its own mere assertion is enough to establish its privileges even in transactions outside Parliament, and that no other court can enquire into their extent and applicability; in short, one House of Parliament is claiming to be above the rule of law as truly as any Stuart monarch ever did. In the

[1] The resolutions as summarised by P. A. Landon, in the 17th edition of Stephen's *Commentaries on the Law of England*, vol. i, p. 150.

[2] The whole story is longer than this: there were three cases in all.

event the claim failed: it was an intolerable deadlock that Stockdale should be in possession of a verdict from the Queen's Bench, and that he, his solicitor, and the sheriff should all be in prison for getting it and trying to carry it out. The possibility of a future deadlock on the same point was prevented in 1840 by the Parliamentary Papers Act, which provided that in future proceedings against publications made by order of either House should be stayed on production of a certificate that they were so made.

So the House of Commons practically admitted that its claim had been excessive, that its own declaration did not suffice to make, nor even to declare, law that should be binding on other courts, beyond what was proper for the regulation of its own proceedings. The converse of this, that the Commons cannot be controlled by the courts in the decision of matters arising within the House, has long been settled, and was specifically laid down by the Court of Queen's Bench in *Bradlaugh v. Gossett*, a case in which Bradlaugh, disabled from sitting and voting by the House's decision that as an atheist he was unable to qualify himself by oath, vainly sought a declaration that the House's order was invalid.

Lastly, the insufficiency of vote of the House of Commons alone to affect the law was recently (1912) demonstrated in *Bowles v. the Bank of England*, when the plaintiff successfully sought from the defendants return of income tax deducted from his property on the strength of proposed taxation which had passed the House, but had not yet become law.

Thus the rule of law[1] is now safe enough from the open invasions with which the Crown threatened it, especially in the seventeenth century, and the House of Commons especially in the eighteenth; it might still be liable to suspension and to undermining, or the application of the rule itself might be so capricious or interested that it could not be said to enforce anything worth calling law. Let us take the first of these cases first, for it is capable of the shortest and most definite treatment.

The nearest thing in constitutional practice to a suspension of the rule of law is its replacement by what is called martial law. As late as the eighteenth

[1] Remember that one part of it is that Act of State, i.e. political considerations overriding legal rights, cannot be pleaded against a British subject (*Walker v. Baird*), nor against a resident, however unfriendly, if not technically enemy (*Johnstone v. Pedlar*), but only against a non-resident alien (*Buron v. Denman*). These references are due to Mr. A. D. McNair.

century one view of this was that the Crown had a prerogative to govern ordinary citizens, in case of rebellion, by martial law. But the better view was (and it is now safe to say that the true view is) that martial law, so-called, is no more than the application of the common law principle 'that life may be protected and crime prevented by the immediate application of any force which, under the circumstances, may be necessary.'[1] The officers of the Crown (and, for that matter, all other subjects) are justified in any use of force that may be required for these purposes, but on such an occasion, as on all others (and here is another great constitutional principle) they are liable civilly and criminally for any excess of force, and they must not inflict punishment nor retain their prisoners after resistance is suppressed and the ordinary courts are available.

What this means may be sufficiently illustrated by two or three cases. In 1798, after the suppression of the Irish rebellion of that year, Wolfe Tone was sentenced to death by a court martial for participating in the rebellion and in the French invasion which accompanied it. The Irish King's Bench

[1] Cockburn, C. J., in *Rex v. Nelson and Brand.*

granted an application for Habeas Corpus, and directed the sheriff to see that he was not executed. And in the same year Wright recovered £500 damages from Fitzgerald, who had flogged him, although the flogging had taken place in time of rebellion, and although there had since been an Act of Indemnity, the court holding that, even so, there was no justification for anything that exceeded the necessities of the case, or that fell short of the attainable maximum of legality and humanity. But yet neither of these cases deny that it is the right of the authorities to do all that may be necessary for the maintenance of order; and not only the right but the duty, for failure in which they may be called before the courts, as was settled in the case of *Rex v. Pinney* (1831).

Martial law, then, does not exist under our constitution in the usual, foreign, sense of an extraordinary jurisdiction to which the Government can have recourse at its discretion. Such jurisdiction can, of course, be established occasionally by statute, as anything else of a legal nature can be done, and as was done, for instance, by the Defence of the Realm Acts, but nothing less than statute can authorise it. A general permanent right of recourse

to exceptional powers of a restricted character the Government has, indeed, lately acquired, by grant of statute, modifiable and revocable, therefore, at Parliament's discretion. Under the Emergency Powers Act (1920), His Majesty in Council may, in view of action taken or threatened against the necessities of life (including locomotion), proclaim a state of emergency, not to last longer than a month without renewed proclamation. Parliament must be informed, and, if it is not sitting, summoned within five days. His Majesty in Council may make regulations to meet the emergency, but not such as to establish conscription, alter procedure in criminal trials, or impose penalties on peaceful picketing; such regulations may provide for trial by courts of summary jurisdiction, with maximum penalties of £100 fine or three months' imprisonment; they lose their validity unless confirmed within seven days by resolution of both Houses, which may also amend them.

This has much less of the leading characteristic of martial law, which is exceptional *jurisdiction*, than it has of exceptional *legislation*; it is altogether based on statute; and the rules which it authorises must themselves be made, not indeed with statutory forms, but with the concurrence of Parliament.

The transition is short from them to the consideration of the danger which the rule of law and the sovereignty of Parliament run from what is called delegated legislation.

All the by-laws under which we live—rules drafted by Government departments, by municipalities, by railway companies—are instances of delegated legislation, of rule-making under parliamentary authority. How much of our legislation is of this secondary, only indirectly parliamentary, kind is very seldom noticed. It is, for example, according to one authority, this sort of regulation[1] ' by which our poor-law system has, in all its main features, been established almost without the conscious co-operation of Parliament.' It is not too much to say that most of the legislation which affects ordinary people in their ordinary avocations is of this kind. In the year 1920, for instance, there were ten times as many ' Statutory Rules and Orders ' as statutes, containing altogether five times as many words as all the statutes together and certainly affecting common life not less intimately and directly.[2]

[1] Ramsay Muir, *Peers and Bureaucrats*, p 21.
[2] Cf. C. T. Carr, *Delegated Legislation*.

Here there is no theoretical, but there is a very real practical, danger to the twin principles of parliamentary sovereignty and the rule of law, that the law should be supreme, and that it should be unchangeable except by Parliament. There is still no change in the law but what is created by Parliament, only the creation has become indirect. It is clearly both the duty and the interest of Members of Parliament and of their constituents to see that the powers delegated are used in accordance with the will of Parliament and of the nation.

It is, of course, the business of the courts to uphold the principle that any power conferred by statute must be exercised in strict conformity with the terms of the statute, and to treat as invalid any action which is not so exercised; but the terms of the statute are not the same thing as the intention of Parliament, still less the will of the nation. There is this further danger in the extension of departmental authority, that it involves the endowing of departments with functions that are judicial in all but name.[1] Think, for instance, of the importance

[1] Cf. A. V. Dicey, 'The Development of Administrative Law in England,' in the *Law Quarterly Review*, xxxi (1915), p. 148.

of such functions in the administration of pensions and of insurance. Here, then, is something like an exception to the rule of law—matters really judicial, and yet transactable outside the ordinary courts. The likeness has been intensified by the decision in *Local Government Board v. Arlidge* ' That, when a statute confers on a Government department judicial or quasi-judicial jurisdiction . . . and does not lay down any rule how this jurisdiction is to be exercised, the department is not bound to follow the rules of procedure followed by English courts, but is certainly at liberty . . . to exercise this jurisdiction in accordance with the rules adhered to by the department in the conduct of its usual business.'[1]

Dicey was inclined to fear that this process sapped the foundation of the rule of law ; but he also hoped that ' in some form or other the English courts will always find the means for correcting the injustice, if demonstrated, of any exercise by a Government department of judicial or quasi-judicial authority.' We may console ourselves with the same hope, and also with the memory that, after all, Parliament still remains supreme to make and re-make law,

[1] Dicey, op. cit.

and that Ministers still have the power (or at least the right) to control their departments, the House of Commons to control Ministers, and electors to control the House of Commons.

CHAPTER VIII

THE RULE OF LAW AND THE FREEDOM OF THE SUBJECT

ONE essential characteristic of the rule of law has now been (I hope) explained—that it cannot be controlled or changed except by statute. The other things most necessary to be known about it are these: the leading principles by which the courts administer the law; the sense in which every one is subject to it, and especially every servant of the Government; the manner and degree in which it secures the liberty of the subject. They will be the business of this chapter.

This is not the place to attempt a history of the law of evidence and the rules of procedure; but a private citizen of to-day would hardly feel that the rule of law gave him any guarantee against oppression if he were liable to the treatment from the courts which would have been normal, for instance, at the beginning of the seventeenth century; and it seems worth while, therefore, to attempt some

indication of the advantages which he has acquired since then, which he regards now as his constitutional rights, and which cannot be taken from him except by legislation.

Remember how an accused person was treated in the days of Shakespeare. The preliminary examination, conducted then, as now, by justices of the peace, was not then, as now, an assurance of immediate release unless there were at least a superficial case against him, but rather a device by which the authorities endeavoured to get together material for a conviction: the magistrates did nothing to protect the prisoner—to warn him, for instance, that what he said might be used as evidence against him, but a great deal to extract evidence and to elicit admissions. The prisoner accused of felony was given no facilities for preparing his defence, no counsel, no notice of the evidence against him, but, on the contrary, was examined for the prosecution.[1] He was protected by no rules of evidence, was not safe, for instance, from 'the saying of Sir Richard Spark, clerk, who would not be sworn, but said he heard it of a man who was not brought afore us'; and the confessions of accomplices were freely used

[1] Cf. Sir Fitzjames Stephen, *History of the Criminal Law.*

against one another. He was, as a rule, not allowed to call witnesses; if he were he could not compel their attendance, and when they attended they were not sworn, so that their evidence was less weighty than that of the prosecution. Witnesses were not prosecuted for perjury, but juries sometimes were. The courts were the King's, the judges merely his paid substitutes. Courts were open, but there were no newspapers. There was no court of criminal appeal.

There were historical explanations how all these things had come to be so, and reason enough why some of them still were so. Yet a necessary prerequisite of what we mean by the liberty of the subject under the protection of the rule of law was that they should cease to be so. It was partly by enactment that this happened, but very much more by judicial decision, and especially by change of judicial habit.

It had long been the regular usage that kings should not sit in person, and it may be said to have been settled in James I's reign by Coke's opinion that they could not. They could still, however, use their power of dismissing judges to influence the decisions of the courts, until in 1701 the Act of Settlement made judges irremovable except by vote

of the two Houses of Parliament. The seventeenth century also improved the rules of evidence: in 1660 it was held that hearsay evidence was admissible only in corroboration of direct evidence; in 1684 Chief Justice Jeffreys, more usually remembered for what he did ill than for what he did well, ruled that 'what the witness heard from a woman is no evidence.'[1] After 1702 accused could call witnesses, but it was not till 1826 that, if it were a felony for which he was being tried, he could have the aid of counsel, except on mere points of law.

Of all these fortifications of the accused against the Government, the chief was the vindication of the independence of juries. In the old days a jury was selected, not, as now, for its disinterestedness, but for its intimacy in the matter at issue. There was nothing unreasonable in punishing it for giving a verdict against the apparent facts, and, indeed, in civil cases where important questions of property were to be decided, it was almost necessary that juries should have something to fear if they allowed themselves to be driven or enticed away from truth. It is only in the fifteenth and especially the sixteenth centuries that modern procedure comes

[1] Kenny, *Criminal Law*, p. 364.

to be recognisable, with witnesses stating the facts and juries deciding them. To meet this, as has been seen, there began the punishment of perjured witnesses; and, as it began to seem necessary to punish them, it began to seem unreasonable and dangerous to punish jurors: dangerous, because, now that the Government was habitually supplying a tolerable amount of law and order, it was no longer about the quantity of those commodities, but about its quality that public opinion was anxious. In Tudor times the important thing was that there should be no chance of escape for any enemy of the State; in Stuart times that there should be no opportunity of oppression for any branch of the Government.

So in 1667 the House of Commons resolved 'that the precedents and practice of fining or imprisoning jurors for verdicts are illegal.'[1] It was as far as possible from certain that this was true as a statement, and it had no validity as an instruction. But three years later *Bushell's Case* effectively settled the question, when it was held that finding against the evidence, or direction of the court, is

[1] Cf. Thomas's *Leading Cases in Constitutional Law* (5th edition by H. H. L. Bellot), p. 144, and ibid., 145.

not sufficient cause to fine a jury. It was still possible in civil cases, by writ of attaint, for a jury (of twenty-four instead of twelve) to reverse the verdict of an earlier jury, which in that case might be punished; but in 1826 this writ, long obsolete in practice, was abolished by statute.

It should be noted that a recent statute (the Administration of Justice Act, 1920) has provided that in a civil action not being one for slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise, order for trial without jury may be made by the court or a judge on application from either party, if it appear that the matter cannot be tried as conveniently with as without a jury. On this it may be enough[1] to quote the comment of Lord Justice Atkin: 'Trial by jury is an essential principle of our law. It has been the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful. Anyone who knows the history of our law knows that many of the liberties of the subject were originally established and are maintained by the verdicts of juries in civil cases.'

There we must leave one side of the rule of law—that the private citizen can be tried only in the

[1] But cf. n. 1 p. 27.

ordinary courts, according to the known laws, by a procedure agreeable because it is traditional, and liberal because the tradition is individualist. Less close in the ordinary way to the private citizen, but in the long run not less important to his liberties, is another side—that the public officer is subject to the same courts, the same laws, and the same procedure.

This was secured in the seventeenth century, when the King ceased to be able to protect his servants by special courts (like the Star Chamber), by interfering with the ordinary courts (as by pardons in bar of prosecution), or by rendering the law inoperative (as by dispensation).

Wilkes, whom (said Mr. Gladstone), 'whether we like it or not, we must count one of the great champions of English liberty,' here comes in again, for he, and the printers arrested with him on a general warrant for publishing No. 45 of the *North Briton*, not content with merely obtaining release, sued the Secretary of State, the Under-Secretary, and the messengers to whom their arrest was due, and obtained damages from all of them.

It should be noticed that it was not the King who was sued, nor any other symbol or embodiment of the State or its Government, but the officials

actually concerned. The Crown cannot be sued for wrong caused by the act or negligence of its servants, yet in practice no injustice arises because the servants can be sued, and the Government is accustomed to assume a moral responsibility for any damages that may be awarded. If the official's conduct has been criminal, there has been no doubt since Lord Danby's case that he is liable to prosecution.

In matters of contract the law is not simple and uniform, but its substance may be sufficiently indicated in a few words. The Crown cannot be sued, but by statute a good many Government departments can—the Office of Works, for instance, the Ministry of Health, the Air Council. In other cases procedure is by Petition of Right; that is, not demanding a remedy guaranteed by law, but praying that the request for redress may be judicially tried. In practice this prayer is never refused, and then the action proceeds in the ordinary form.

But the great thing to remember is this, that, in Dicey's words,[1] 'every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen—

[1] *Law of the Constitution*, p. 189.

officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character, but in excess of their lawful authority. A colonial governor, a secretary of State, a military officer and all subordinates, though carrying out the command of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.'

Before leaving these subjects of the relations between the Executive Government and the administration of the law, and of the universally identical applicability of the law, it will be convenient to say something about the Government's initiative in political prosecutions, and about the peculiar legal position of trade unions.

About the first of these subjects a great deal has been said and written recently in connection with the Campbell case, and most of it is not worth repeating or criticising. The extreme claim for the unchecked dominance of the law and nothing else is that in cases of apparent treason, sedition and the like the Attorney-General should, in a judicial spirit, and on legal grounds, refusing all advice from

Cabinet Ministers, decide whether to prosecute or not. It is difficult to show that this has ever been established as a rule, and impossible to believe that it has been invariably followed in practice: nor does it seem to be desirable as a standard of constitutional propriety.

Even in cases not at all political, the agents of Government do not proceed against every one of whom they are reasonably sure that he has broken the law. In such cases it is no doubt mainly a question of legal considerations, especially the consideration whether there is evidence enough for a conviction. But in cases of treason, sedition, incitement to mutiny (the offence alleged against Campbell), other questions arise. Here the essence of the crime, that which makes it a crime, is its tendency to endanger the State, not this or that interest or subject of the State, but the State as such. Then it would be absurd that all the weight of the law should be launched if the Cabinet, the organ generally pre-eminently responsible for the safety of the State, were convinced that the State would be more seriously threatened by the incidents of the prosecution than by the impunity of the criminal. The casting of this balance must always be very

difficult: there seems no reason why the Attorney-General should not have the assistance of his poltical colleagues. If they bring into the balance the interests, direct or indirect, personal or partisan, of themselves or their friends, then no doubt it is his duty to resign his office, and publicly to explain the reason. No doubt also (a minor matter, but not unimportant) it will rarely or never be proper to drop a prosecution once instituted, when the accused maintains that he has a complete defence.

It is not improbable that the next stage in the history of constitutional development may be the decision of the question whether political authority is to remain concentrated in the control of Parliament, or whether it is to be parcelled out, especially to trade unions. For this and other reasons it is much to be desired that there should be the widest possible diffusion of knowledge about the very complicated history of trade union law and its present position. Here no more will be done than to point out one effect of the Trade Disputes Act, 1906, which is that 'If a trade union, whether of workmen or masters, causes a libel[1] to be published

[1] Even if at the time there is no trade dispute pending (*Vacher* v. *London Society of Compositors*, to which case my attention was drawn by Mr. A. D. McNair).

of A or B, or excites some fanatical ruffians to assault A or B, neither A nor B can maintain an action against the union '[1] for doing so, though he can, of course (with, however, little hope of collecting damages or costs), against the publishers or the ruffians. No doubt some alteration of the law was desirable in 1906, and it may be (though I do not believe it) that the enactment indicated above was the best alteration possible: what is here to be noticed is that it involves something fairly to be called an exception to the rule of law, though by authority of statute, that it puts trade unions in an unique position of privilege.

The third of the divisions of the rule of law which I quoted from Dicey is 'that the general principles of the constitution (as, for example, the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases.' This is the chief of all, for liberty is a word which may mean so many things that it is in danger of meaning nothing, but here is a meaning that is real and comprehensible, that a man should do what he chooses with his own person and with the expression

[1] Dicey, *Law and Public Opinion*, 2nd edition, xlv.

of his own thoughts, or at least that the limitation on his choice should be known and general. Nevertheless, though this division of the subject is of the first importance, yet it may be shortly treated, partly because it is so specific, and partly because it is more generally understood than other divisions.

The history of personal liberty in England is usually begun with a quotation from the thirty-ninth article of Magna Carta: 'No free man shall be taken or imprisoned . . . unless by the legal judgment of his peers or by the law of the land.' We need not pause to discuss the difficult question of what this meant, especially the word *free*, and the phrase *or by the law of the land*. We may jump to the early seventeenth century, where the matter still at issue was whether the special command of the King could be part of, or could override, the law of the land; whether a person deprived of liberty by that command was deprived of recourse to the courts.

This battle was fought round the writ of habeas corpus. This writ was of several kinds; its essence was a command from the King to somebody to produce someone else—'you are to have the body' of so-and-so, at such a place, at such a time. By

nature, then, it was an instrument of the King's, and rather for getting someone into prison than for getting someone out. Then (in the fifteenth century, and still more in the sixteenth)[1] one kind of habeas corpus became much the most important, habeas corpus cum causa, a writ for getting a person into a court, so that the cause of his detention might be known. This writ was used for securing trial, for if, when the prisoner got into court, it appeared that there was no legal cause for his detention, he was released.

He still would not get his release, however, if the judges held that 'the special command of the King' was legal cause, as they did in the famous *Five Knights' Case* in 1627. Parliament endeavoured to affirm against the King the illegality of such a decision by the Petition of Right (1628), but it is doubtful whether that was the legal force of the Petition, and certain that it was not practically effective.

Doubts about the law, and hindrances to its effectiveness, have therefore been removed by statutes, of which the principal are the Habeas

[1] Cf. E. Jenks, 'The Story of Habeas Corpus,' *Law Quarterly Review* vol. xviii., p. 64.

Corpus Acts of 1679 and 1816; the first the leading authority in connection with persons criminally accused, the second in connection with persons otherwise deprived of their liberty. On the application of any such person, or of anyone on his behalf, showing reason for presuming a case of illegal imprisonment, the High Court (or during vacation anyone of its judges) will issue the writ, and the person concerned will be brought before it, to be there released or provided with speedy trial. So that no one can be deprived of personal liberty unless the High Court can be convinced that he has legally forfeited it, as was recently (1923) exemplified in the case of O'Brien, who had been arrested and deported to Ireland under a regulation alleged to have been made with statutory authority. The regulation was held to be invalid, and O'Brien was released, no account being taken of the high authority (that of the Home Secretary) under which the arrest was made, or of the possibility that O'Brien's arrest prevented much greater harm than it caused.

Political arrangements cannot keep a man from thinking anything of which his mind is capable, but to liberty of thought, in the most usual and useful sense, it is necessary that he shall enjoy,

besides this natural intellectual freedom, and besides the personal freedom indicated above, freedom of discussion and freedom of assembly as well.

In the British constitution there is no general grant of freedom of either of these two kinds, but a high degree of each is secured to the public by the protection which the private subject receives from the courts, both against other subjects and against the Crown, in the exercise of his rights to go where he chooses and to say what he likes, within the law.

As to saying what he likes, whether in speech, writing, or print, the relevant part of the law is that which relates to libel, sedition, and blasphemy. This part of the law cannot be shortly explained, if only because it is of its nature impatient of exact definition. A seditious intention, for instance, 'means an intention to bring into hatred or contempt, or to excite disaffection against the King or the Government and constitution of the United Kingdom as by law established, or either House of Parliament, or the administration of justice, or to excite British subjects to attempt otherwise than by lawful means the alteration of any matter

by law established, or to promote feelings of ill-will and hostility between different classes.' It will be seen that this might suffice to make all political discussions impossible. The reason why it is not so used was stated by Lord Kenyon (in *Rex v. Cuthell*, 1799). 'It is neither more nor less than this: that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes that which is blamable (i.e., that which twelve of his countrymen think is blamable). This in plain common sense is the substance of all that has been said on the matter.' In other words, a publication is libellous, seditious or blasphemous, if a jury can be persuaded to think so, and not otherwise.[1]

It is to be noted that the sanction of the right of public meeting (if what is really the sum of a series of private rights to be in a particular place at a particular time may be so called) is that the courts will protect anyone legally assembling with others against whoever may have interfered with him;

[1] In the eighteenth century the dominant view among lawyers was that the jury should find only as to the facts, the judge deciding the law, e.g. whether the facts found amounted to libel, until, in 1772, Fox's Libel Act settled the doctrine stated in the text. Incidentally, Lord Kenyon himself had always held this doctrine, and therefore opposed Fox's bill as unnecessary.

and it may be enough explanation of *legally assembling* to say that it must be 'in a place which the meeting has a right to occupy, and acting in a peaceable manner which inspires no sensible person with fear.'[1] The meeting must not invade private property, must not inconvenience the public, must not be for an unlawful purpose, and must not threaten violence, or even appear to tend towards violence. If the meeting does none of these things, then each person present is behaving lawfully (unless he is committing some specific offence, like picking pockets), and he has a legal remedy against anyone—soldier, policeman, or private individual—who interferes with him.

[1] Dicey, *Law of the Constitution*, app. p. 498.

CHAPTER IX

CONCLUSION

ALL acts of British Government, internal and external, are acts of the Crown ; all other acts of the Crown are subordinate to acts of the Crown in Parliament : the character and purpose of the acts of the Crown are determined by the Cabinet, and the Cabinet owes its power to the willingness of the majority in the House of Commons (which dominates Parliament) to obey its directions : all subjects of the Crown are judged by the same courts in accordance with the same rules, and the servants of the Crown are obliged, no less than other men, to obey the law : the right (not the absolute right, but the equal right) of every subject of the Crown to the management of his own person and to the formation and expression of his own opinion is not granted by the Crown (though no doubt it can be legally taken away by the Crown in Parliament), but arises out of this rule of law, which is more than part of the constitution, in a sense is the constitution,

which is not guaranteed by the Government, but rather is the guarantee of the Government.

I have tried to show how and why these things are thus, that their thusness is so intense as to decide the character of the British constitution, and that it goes so deep that it may fairly be called the permanent element in it. These things, it may almost be said, are the constitution: but it cannot quite be said.

It cannot quite be said because there are some other things also which cannot be denied to form part of the constitution on any classification, and a good many others without a knowledge of which no view of the working of the constitution can be complete. Space fails for a comprehensive account, or even list, of these things, but it may be useful to indicate shortly what some of them are.

Perhaps the most glaring omissions concern the Parliament. A good deal has been said here about the Crown in Parliament, and about the House of Commons, almost nothing about the Lords, and about the relation between Parliament (the Commons especially) and the people; hardly anything except that the Upper House's sole remaining legislative power is to hold up non-financial measures for two

years, and that almost every man over twenty-one and woman over thirty is legally entitled to a share in deciding the composition of the House of Commons. There is room for a great deal more discussion here as to what is the effective influence still remaining to the Lords, what is in practice the degree of control exercised by the electorate over the Commons, whether it has been really raised by the modern extension of the franchise, or whether that process has not rather increased the power of newspaper and party organisations, and in what proportions.

There is much, also, of the greatest importance that might be written about the relation between the House of Commons and the Government, how congestion of business and modern alterations in procedure have put all of the House's time at the disposal of its leader, how far the development of Party has turned him into an autocrat, how the delegation of law-making and the complication of financial arrangements have reduced House of Commons control, how seldom nowadays a private member does anything of public interest, or ministers lose office because they have lost parliamentary confidence.

It has been fashionable lately to lay great stress on all these processes, and to use a tone of elegiac patronage in speaking of the House of Commons. I believe it could be shown that both the independence of the House in the past and its submissiveness in the present have been vastly exaggerated: that popular agitation in the old days gained effectiveness from the weakness of the police as much as now from the strength of the Press. As for private members, we have seen them (in the 1924 Parliament) playing a most conspicuous part, and when their part has been much less conspicuous it has not always been proportionately less effective.

Along with the fashion of minimising the practical importance of the House of Commons has gone an affectation of smiling at the sovereignty of Parliament. The champions of that sovereignty may sometimes have made it a little ridiculous, and it is certainly well to remember that it has no theological virtues or supernatural powers, that it is a legal device for dealing with men and the things which men can control. But all attacks on it which deny that it is the very heart of the British constitution are either ignorant or dishonest, and it may still be allowed to hope that they will be futile.

Parliamentary sovereignty is threatened not less by the increase of other demands on loyalty than by any decrease of reverence for Parliament. In England at present no church can hope to dominate the State, or even to have the full support of the State, and none is content to exist by the tolerance of the State, to have less than an absolute existence in its own right. There is here the possibility of challenge to sovereignty, but, with the strength of the modern tradition against State interference with religion, it is a possibility that may be generally ignored. With vocational associations, especially trade unions, there is a similar possibility, related much more seriously and continuously to reality. For they are by their nature incapable of learning the lesson the churches have (more or less perfectly) learnt, that they can be free from political arrangements only by having nothing to do with them, and yet prone to make the same claim as the churches, that there are great areas of human activity which are their concern, and not the concern of the State. How far they have gone towards making good this claim, or part of it, whether they should be allowed to go further, and, if so, how or what steps should be taken next if the general

supremacy of the State organised in Parliament is to be maintained—these are all questions which might form part of a comprehensive study of the modern constitution.

The very little that has been said about the Civil Service might without irrelevance be very largely expanded: it might be shown how enormous the Civil Service, national and local, has become, how often it now performs functions which might seem naturally judicial, how much its administrative habits and traditions control the decision of policy, how large a part of our legislation it frames and even suggests. And the mention of local Civil Service is a reminder that nothing has been said here of the whole vast subject of local government, with its immense importance in itself and in relation to central government: nor has anything been said here about the government of the Empire, except to indicate partially the part played in it by the Crown, nor more than a very little about the administration of justice, nothing about the structure of it—justices of the peace, Stipendiary Magistrates, Commissioners of Assize, High Court of Justice, Chancery jurisdiction, Court of Criminal Appeal, House of Lords.

Yet the book may have been useful if it has shown that there are good historical reasons why these things that here follow should be elements of the constitution:——all power (that is, the right to control all subjects in their relations with each other and with the outside world, so far as such a right can be properly held by any secular agency) concentrated in the Crown, exercised by the Cabinet, under the control (always applicable, if not continuously applied) of a deliberative assembly answerable to the people, and regulated by independent and respected courts enforcing known and general rules: and if it has brought conviction also that we should insult our ancestors and cheat our posterity by allowing these elements to be removed or exhausted without the most absolute certainty of receiving in exchange better and quicker ways to the same end —the strength of the nation and the freedom of the individual.

INDEX